NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 978 of 2024

(Arising out of the Order dated 05.04.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court- II) in I.A. No. 114 of 2023 in C.P No. (IB) – 708/ND/2021)

IN THE MATTER OF:

Everlike Real Estate & Developers Pvt. Ltd.
A company registered under the Companies Act, 1956,
Having its registered office at C-74,
Front
Portion, Ground Floor,
Inderpuri, New Delhi – 110012
Email: everlikereal@gmail.com **…Appellant**

Versus

1. **Mr. Mohit Goyal, CA,**
   Resolution Professional of
   Aadi Best Consortium Private Limited,
   RC 1/2, Sector – 1, Vaishali,
   Ghaziabad – 201010.
   Uttar Pradesh,
   Email: irpaadibest@gmail.com **…Respondent No. 1**

2. **Skael Enterprises Private Limited**
   Registerd Office at S-503
   First Floor, School Block,
   Shakarpur,
   Delhi – 110092
   Email: skaelenterprise@gmail.com **…Respondent No. 2**

Present

For Appellant: Ms. Pooja M. Saigal, Mr. Arpit Dwivedi, Ms. Sakshi Kapoor & Mr. Ishank Jha, Advocates.

For Respondent: Mr. Krishnendu Datta, Sr. Advocate along with Mr. Arjun Maheshwari, Ms. Niharki Sharma & Mr. Adish Srivastava, for R-1.
Mr. Preetesh Kapur, Sr. Advocate, for R-2.

J U D G E M E N T

(02.07.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by Everlike Real Estate & Developers Pvt. Ltd. (in short **Appellant**) under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') against the Impugned Order dated 05.04.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court - II) (in short '**Adjudicating Authority**') in I.A. No. 114 of 2023 in C.P No. (IB)-708/ND/ 2021, whereby the Adjudicating Authority dismissed the application filed by the Appellant under 60(5) r/w Section 18(b) of the Code r/w Regulation 13 of the IBBI (Insolvency Resolution Process for the Corporate Person) Regulation, 2016.

2. Mr. Mohit Goyal is the Resolution Professional of the Aadi Best Consortium Private Limited (in short **'Corporate Debtor'**) and Skael Enterprises Private Limited is the Respondent No. 2 who is the Successful Resolution Applicant of the Corporate Debtor.

3. The background of the case is that the Mr. Yogesh Gupta, Sole Proprietor of Rapid Constructions filed an application under section 9 of the Code before the

Adjudicating Authority which was admitted vide order dated 31.03.2022 and Corporate Insolvency Resolution Process (in short '**CIRP**') commenced with appointment of Mr. Mohit Goyal as the Interim Resolution Professional (in short '**IRP**') who was later confirmed as Resolution Professional (in short '**RP**').

4. The IRP/RP issued a public announcement inviting claims from various creditors within the last date for submission of claims i.e., 15.04.2022. In 8th Committee of Creditors (in short **'CoC')** Meeting held on 16.08.2023 and continued on 18.08.2023, the Resolution Plan of Respondent No. 2 was placed before the CoC which approved the Resolution Plan with 100% voting. The Resolution Plan was submitted by Resolution Professional for approval of the Adjudicating Authority in I.A. No. 6676 of 2023 under Section 30(6) of the Code. Vide Para 46 of the Impugned Order dated 05.04.2024 the Resolution Plan was approved by the Adjudicating Authority. The relevant portion of the aforesaid para reads as under :-

> *"46. In the sequel to the above, we are inclined to approve the Resolution Plan as approved/ recommended by the CoC as placed by the Applicant before this Adjudicating Authority…"*

5. In the same Impugned Order several I.A's were also discussed and disposed off.

6. The Appellant had filed I.A. No. 144 of 2023 which was also discussed in the Impugned Order from Para 15 to 21 and after discussing various issues and

recording the submissions of the Appellant and Respondent No. 1, the I.A. No. 114 of 2023 of the Appellant was rejected. The relevant para 21 of the Impugned Order is read as under :-

> "21. *A perusal of the aforementioned provision of RERA, 2016 and MOU clearly reveal that there was no valid BBA in existence in favour of the Applicant, thus there was no infirmity in its classification as the one who did not hold any valid BBA.* ***In the wake, we do not find any ground to interfere with the plan, in terms of the provisions of Section 30(2)(e) of IBC, 2016 and the objection to the resolution Plan, raised in terms of IA-114/2024 is nixed and the IA is rejected."*** *(SIC.)*
>
> *(Emphasis Supplied)*

7. We note that the I.A. No. 114 of 2023 was filed by the Appellant in C.P No. (IB)- 708/ND/ 2021 on 03.11.2023 (Reference : Annexure A-17 of the Appeal Paper Book, Volume -II) and the appeal also mention the aforesaid I.A as I.A. No. 114 of 2023, whereas the Impugned Order mentions I.A. No. 114 of 2024 both in the first page as well as in Para 15 of the Impugned Order. For our discussion purpose in subsequent paragraphs, we shall mention I.A. No. 114 of 2023 as filed by the Appellant on 03.11.2023. Vide I.A. No. 114 of 2023, the Appellant sought issuance of directions to the Respondents to include the claim of the Appellant in the 2nd category of the Resolution rather than in the 4th category of the Resolution Plan.

8. At this stage, it would be desirable to look into the various categories mentioned in the approved Resolution Plan. The Impugned Order captures such details contained in the Resolution Plan which read as under :-

8.3. **Financial Proposal for repayment of Financial Creditors, Operational Creditors, Other Creditors and Statutory Authorities.**

8.3.1. The Resolution Applicant proposes to pay and settle with all the stakeholders of the Corporate Debtor including the Financial Creditors, Operational Creditors and Statutory Authorities in the manner provided herein below.

Further, we have also provided below the proposal regarding the management of the Corporate Debtor along with proposal for development of the Project.

8.3.2 Summary Financial Proposal:

S. N.	Particulars	Amount Claimed – INR	Amount Admitted – INR	Payment Proposed – INR	Schedule of Payment
1.	Insolvency Resolution Process Cost	--	--	as per actual 1,55,23,538/-	The Resolution Applicant has estimated that such CIRP costs along with any future costs upto the date of the NCLT approval to be not higher than Rs. 1,85,23,538/- (Rupees One Crore Eighty-Five Lakh Twenty-Three Thousand Five Hundred & Thirty-Eight Only). RA proposes to pay the unpaid CIRP cost which is estimated to be Rs. 30,00,000/- (Rupees Thirty Lakhs Only) in full. Additionally, as per the information provided by the Interim Resolution Professional, the IRP has already incurred expenses for

					an amount of Rs. 1,55,23,538/- which have already been met out with the funds lying in the CIRP account of the CD and hence do not require any treatment under this Resolution Plan. Any CIRP Costs over and above the said amount of Rs. 30,00,000/- (Rupees Thirty Lakh only) shall be Paid in accordance with the Clause 8.1.4.
2.	Secured Financial Creditors	55,61,81,028	55,61,81,028	20,00,00,000	• Rs. 5 Crore—within 30 days from the Effective Date • Within 90 days (Quarter 1) -- Rs. 3 Crore • Within 180 day (Quarter 2) -- Rs. 3 Crore • Within 270 days (Quarter 3) -- Rs. 3 Crore • Within 360 days (Quarter 4) -- Rs. 6 Crore
3.	Financial Creditors in Class (Allottees/ Flat Owners) – *I. Whose Possession has been handed over to Flat Owners* *II. Whose Possession of flats to Flat Owners is pending as on CIRP date* *III. Cancelled Units (Having valid BBA)* *IV. Cancelled Units (not having valid BBA)*	2,19,35,55,454	76,92,94,658	--	100% of Admitted Principal Amount as adjustment against allotted units in the project within the timelines envisaged in the plan or 40% of the Admitted Principal Amount as cash refund in cases of cancellation where the Allottees do not opt for the adjustment, as the case may be. The detailed terms of the financial proposal for each category of the Flat Owners have been in provided for in Para 2 of the table in 8.3.3

RESOLUTION PLAN IN THE MATTER OF AADI BEST CONSORTIUM PRIVATE LIMITED
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					(3) below.
4.	Other Unsecured Creditors	10,80,00,000	0	0	Since the IRP has received claim for an amount of Rs. 10,80,00,000/- under unsecured FC (other than class of Creditors) and hence the same are kept under verification. However, if any of the claims are admitted by the IRP / NCLT after the approval of Resolution Plan by the COC than RA proposes to settle such claims out of the contingent fund allocated in the Resolution Plan, subject to a maximum of 1% of such admitted claim amount.

9. It is the case of the Appellant that he has been categorised under category 4 i.e., "Cancelled Units (not having valid BBA)", whereas he should have been categorised under the category 2 i.e., "Whose Possession of Flats to Flat Owners is pending as on CIRP date". It is the case of the Appellant that this is based on Memorandum of Understanding (in short **'MOU'**) dated 24.05.2016. The Appellant submitted that the Impugned Order is perverse in not treating the MOU at par with BBA and approving the Resolution Plan treating him in category 4 instead of category 2 of the Resolution Plan.

10. It is the case of the Appellant that the Appellant is a registered company under Companies Act, 1956 and submitted that in the year 2014 the Corporate Debtor approached the Appellant with the proposal to sale commercial area/ shops/ units in the commercial project being developed in Plot No. RC 1/2,

Vaishali – 1, Ghaziabad, Uttar Pradesh (in short '**Project**'). The Appellant submitted that after several round of discussions and negotiation, the Appellant agreed to purchase shops/ commercial units in the project aggregating to an area of 25,000 sq. ft. for total consideration of Rs. 12.50 Crores and out of which the Appellant paid Rs. 10 Crores by cheques between 2014-2016.

11. The Appellant submitted that the Corporate Debtor and the Appellant entered into a MOU dated 24.05.2016 which contained the various terms and conditions of allotment and obligations of the parties. The Appellant drawn attention in this Appellate Tribunal to clause 1.1, 1,2, 1.3, 2.1, 2.2, 2.5, 3.1 and argued that perusal of these clauses makes it clear that MOU was in nature of Builders Buyers Agreement (in short **'BBA**'). We take note of the MOU which was filed in the Appeal Paper Book as Annexure A-3 from Pg 126 to 134.

12. The Appellant submitted that based on public announcement inviting claims by creditors by Respondent No. 1, the Appellant submitted its claim before Respondent No. 1 in the capacity of Financial Creditor in Clause-A under Form CA along with supporting documents including the MOU and proof of payments on 20.04.2022.

13. The Appellant submitted that aggrieved by the conduct of the Corporate Debtor in its failure to handover the units, simultaneously the Appellant filed an FIR dated 04.06.2022 against the Corporate Debtor and its directors for criminal breach of trust, cheating and dishonestly.

14. It has been brought out that the Respondent No. 1 admitted the entire claims of the Appellant as allottee. In the meanwhile, the Respondent No. 2 submitted its Resolution Plan against the Expression of Interest invited by the Respondent No. 1 and on coming to know these developments, the Appellant requested the Respondent No. 1 and authorised representative of class of creditors with a query sent vide e-mail dated 16.08.2023, which reads as under :-

> *"Kindly discuss with RA and let us know as we fall in category "Whose Possession of flats to Flat Owners in pending as on CIRP date", how will possession of commercial units on Upper Ground Floor of the Project aggregating to approximately 25,000 sq. ft be handed over to us? Also explain how the registry will take place of these units?"*

15. The same was clarified by the Respondent No. 1 in a statement to authorised of representative of class of creditors which reads as under :-

> *"It has already been provisioned under Chapter – 8 of the Resolution Plan."*

16. The Appellant pleaded that since the MOU dated 24.05.2016 is at par with BBA, he should have been classified and put in category 2nd instead of category 4th which is for allottees not having valid BBA. The Appellant pleaded that instead of getting 40% of his claims, due to the Impugned Order, he shall be getting only 5% of his claims.

17. The Appellant submitted that vide e-mail dated 19.08.2023 to the Respondent No. 1 the Appellant protested for inclusion of his name in category 4 and requested Respondent No. 1 for several information followed by few reminders, e-mails and finally he got reply from the Respondent No. 1 vide e-mail dated 13.09.2023 and relevant portion reads as under :-

> *In relation with your email dated 29th August, 2023, we would like to apprise you that we are unable to understand your queries as you have not mentioned the specific unit numbers of the shops in the commercial area. Please clarify the unit numbers of the shops as referred in your previous email.*
> *Further, The Resolution Applicant has put you in the fourth category. We cannot force or compel the respective applicant to change your category.*

18. Aggrieved by the same, the Appellant filed an I.A. No. 114 of 2023 in C.P. (IB)- 708/ND/2021 before the Adjudicating Authority, seeking directions to the Respondents to classify him in 2nd category, however, the same was rejected by the Adjudicating Authority vide Impugned Order dated 05.04.2024 mainly on the ground that the MOU cannot be equated with BBA.

19. In this connection, we have already noted the relevant para 21 of the Impugned Order rejecting I.A. No. 114 of 2023 in our earlier discussion.

20. It is the case of the Appellant that the Real Estate Regulatory Authority Act, 2016 (in short **'RERA Act'**) does not define the term BBA and referred to Section 2(c) of RERA Act which only defines 'Agreement for sale' and Section 2(d) of RERA Act which defines 'Allottees' along with Section 2(e) which defines 'Apartment'. The Appellant argued that these definitions are vide enough to cover MOU to be treated as agreement to sale or BBA.

21. The Appellant pleaded that the nomenclature of the documents is not relevant and decisive factor in determining the true nature and legal effect of any document ie., MOU Vs. BBA, the Adjudicating Authority should have gone into the various clauses of MOU to establish that his claim to be classified in category 2.

22. The Appellant submitted that it is undisputed fact that he has paid Rs. 10 Crores to the Corporate Debtor and the MOU mentions 25,000 sq. ft. as an area to allotted to him. It is the case of the Appellant that since he was awaiting the possession on the date of CIRP, he was eligible to be classified in category 2.

23. In support of his claims to be treated as BBA holder based on his MOU, the Appellant cited few orders of Haryana Real Estate Regulatory Authority and Maharashtra Real Estate Appellate Tribunal.

24. Similarly, the Appellant also referred to the Judgement of the Hon'ble Supreme Court of India passed in the matter of ***B.K. Muniraju Vs. State of Karnataka and Ors.*** *[(2008) INSC 208]* along with another judgement of Hon'ble

High Court of Madhya Pradesh in the matter of ***Laxminarayan and Others Vs. Diwan Singh and Another*** *[(2019) SCC OnLine MP 2673]* and judgement of Hon'ble High Court of Kerala in the matter of ***Ponnu and Ors. Vs. Taluk Land Board, Chittur and Ors.*** *[AIR 1982 Ker 330]* to support his case that the Adjudicating Authority should not have placed too much emphasis on the title of the document and rather should have examined the intent of the documents based on various clauses.

25. Concluding his remarks, the Appellant requested this Appellate Tribunal to allow his appeal and set aside the Impugned Order.

26. Per-contra, both the Respondents denied all the averments of the Appellant treating these as misleading, mischievous and without any merit.

27. The Respondent No. 1 gave the background of the case and drew attention towards relevant dates of the case.

28. The Respondent No. 1 submitted that the Appellant has no locus challenging the Resolution Plan approved by the CoC as the Appellant is an individual member of Financial Creditor in a class who challenged the appeal of the Resolution Plan in I.A. No. 114 of 2023 which is impermissible as held in the judgement of Hon'ble Supreme Court of India in the matter of ***Jaypee Kensington Vs. NBCC*** *[(2022) 1 SCC 401]*.

29. The Respondent No. 1 also refuted the plea of the Appellant that the Respondent No. 1 accepted the claims of the Appellant as the Financial Creditor

in class and therefore, there cannot be any different categorisation of such homebuyers. In this connection, the Respondent No. 1 cited one judgment passed by this Appellate Tribunal in the matter of ***Fervent Synergies Ltd. v. Manish Jaju*** *[(2023) ibclaw.in 774 NCLAT]*.

30. Concluding his arguments, the Respondent No. 1 submitted that there is no merit in the appeal.

31. Opposing the appeal, the Respondent No. 2 stated that the Appeal is without any merit. The Respondent No. 2 refuted the pleadings of the Appellant that the MOU is equivalent agreement to sale or BBA and highlighted that recital 'C' of MOU does not specify any area or earmarked units, whereas the homebuyers agreement/ BBA provides specifies unit members and the area therein.

32. The Respondent No. 2 also stated that the Appellant never produced alleged Annexures 'I' mentions in the said recital C of the MOU and neither filed the same before the Resolution Professional or the Adjudicating Authority.

33. The Respondent No. 2 submitted that Clauses 4 and 5 of MOU makes it clear that the Appellant is basically concerned with the return on investment and has further been given special right of termination in clause C of MOU which has not been given to any other homebuyers. The Respondent No. 2 submitted that all these features of the MOU make it abundantly clear that the Appellant is not

genuine homebuyer and at the best the Appellant may be treated speculative investor.

34. The Respondent No. 2 also refuted the claims of the Appellant that in terms of RERA Act, the Appellant is be treated as homebuyers and submitted that Section 2(e) of the RERA Act i.e., definition of 'apartment', although quite wide, but is qualified by the words 'means a separate and self-contained part of immovable property'. It is the case of the Respondent No. 2 that since, no property has been defined in MOU, the Appellant is not covered in the definition as stipulated in RERA Act.

35. The Respondent No. 2 submitted that there are several judgments of this Appellate Tribunal and Hon'ble Supreme Court of India which permit to differentiate between a genuine homebuyers and a speculative investors and cited judgement of ***Nidhi Rekhan V. Samyak Projects Pvt. Ltd.*** *[(2022) ibclaw.in 109 NCLAT]*, where this Appellate Tribunal held that speculative investors are only interested in return and not possession of flats. Similarly, this Appellate Tribunal in case of ***Sabari Reality Vs. Sivana Reality*** *[(2023) ibclaw.in 775 NCLAT]* also laid down distinction in between affected and not affected persons.

36. The Respondent No. 2 also brought out that the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors.,*** *[(2020) 8 SCC 531]*" has laid down that there can be difference in payment of the different category of creditors.

37. The Respondent No. 2 submitted that the commercial wisdom of Committee of Creditors which approved the Resolution Plan cannot be challenged.

38. The Respondent No. 2 elaborated the details of various categories of homebuyers and justified that based on clear description, the Appellant has been correctly placed in category 4 and submitted that the Appellant could not produce any valid homebuyers agreement not could indicate specific units allotted to him by the Corporate Debtor. The Respondent No. 2 submitted that admittedly even the Appellant has agreed that no particular units were ever allotted to the Appellant and only area was mentioned without any description of the property or the apartments and as such the Appellant at best can be classified under category 4 that cancel units not having valid BBA.

39. Concluding his arguments, the Respondent No. 2 submitted that the Resolution Plan was approved with 100% voting by CoC and was finally approved by the Adjudicating Authority vide Impugned Order based on all facts and correct law and the appeal therefore deserves to be dismissed with cost.

Findings

40. The Respondent No. 2 has pleaded that the Appellant is not genuine homebuyer and at the best is speculative investor. Hence, it would be desirable to go into aspects of genuine homebuyers vis-à-vis speculative investors to see whether this adversely affect the rights of the Appellant in this case. Both the

Appellant and the Respondents have also referred to various definitions and provisions stipulated in RERA Act. Hence, it would also be desirable to look into the relevant definitions and provisions of RERA Act.

41. We would also like to take into account the definition of "Allottee" and the "Real Estate Project" which as per Section 5(8)(f) of the Code has been assigned the same meaning as contained in Real Estate (Regulation and Development) Act, 2016 (in short **RERA Act, 2016**) and relevant clause on the RERA Act, 2016 reads as under:-

> *"**2. Definitions**.-In this Act, unless the context otherwise requires,—*
>
> *(d) "**allottee**" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;*
>
> *(zn) "**real estate project**" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all*

improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

(Emphasis Supplied)

42. The issue regarding speculative investors has been discussed in the judgment of Hon'ble Supreme Court of India in the case of ***Pioneer Urban Land Infrastructure Limited & Ors. Vs. Union of India (UOI) & Ors.*** [AIR 2019 SC 4055] the relevant portion of the judgment as reads as under :-

" ..the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, ***for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment.*** *They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal*

of the management of the real estate project and/or lead the corporate debtor to its death..."

(Emphasis Supplied)

43. From the definition of the Code of Homebuyers as Financial Creditors as contained in Section 5(8)(f) along with two explanation along with definition of 'Allottees' and 'Real Estate Projects' as contained in Section 2(d) and 2 (zn) of the RERA Act, 2016, it is clear that any allotee who has paid the amount in the Real Estate Project shall be deemed to be Financial Creditor and the said amount paid to Real Estate Developers will be treated having commercial effect of the borrowing.

44. The definition of the allottee as contained in Section 2(d) of RERA Act, 2016 defines as the person to whom plot, apartment, or the building as the case may be has been allotted or sold, whether free hold or lease hold or otherwise transferred by the Promoters including person who acquired the said allotment through sale, transfer or otherwise but does not include a person to whom some plot or apartment or building as the case may be is given on rent.

45. Since, 2(d) also mentioned about apartment which is defined in Section 2(e) of the RERA Act, 2016, we will take into consideration the definition of 'Apartment' which reads as under :-

*"2(e) **"apartment**" whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one*

or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;"

(Emphasis Supplied)

46. The definition of the 'Apartment' amplifies the scope of the word 'allottee' which may includes block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit of by any other name. It is significant to note that this also prescribe that it has to be separate self contained part of any immovable property.

47. The word 'allottee' as contained in explanation 1 of Section 5(8)(f) of the Code is by nature is quite exhaustive and illustrative and may include Homebuyer or unit owner or any commercial property owner.

48. The Code or the RERA Act, 2016 do not differentiate anywhere between the Homebuyers who purchase units for his own consumption or the Homebuyers or unit purchaser who purchase the multiple units for commercial purposes.

49. The Hon'ble Supreme Court of India in ***Pioneer Urban Land (Supra)*** held that the allottee, who has given advance or paid money to the Real Estate Developers is a Financial Creditor. We find that the issue regarding the genuine Homebuyers v/s Speculative Homebuyers is relevant only at the stage for the

admission of CIRP under Section 7 of the Code and in this connection we will reiterate that the Hon'ble Supreme Court of India narrating as under :-

> *"...the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out,* ***for example that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment***.
>
> *(Emphasis Supplied)*

Thus, it becomes clear that the Hon'ble Supreme Court of India held the position of speculative investors only for seeking unnecessary insolvency of the Corporate Debtor. The Hon'ble Supreme Court of India held that any allottee who paid for purchasing units will be treated as having effect of commercial borrowing and consequently such unit purchaser will be treated as Financial Creditors.

50. Thus, it becomes clear that whether the homebuyer/ allottee is genuine homebuyer or genuine allottee or speculative homebuyers/ allottee but if he has paid the money for acquisition of such properties or given the advance, such allottee/ homebuyer shall be treated as Financial Creditor in terms of Section 5(8)(f) of the Code . Hence, the pleadings of the Respondent No. 2 in this regard

that the Appellant is speculative investor will not affect the rights of the Appellant to be treated as the Financial Creditors.

51. Now, we shall take up the main contentious issue which is root cause of the present appeal i.e., regarding categorisation of the Appellant in Category 4 rather than in Category 2 of the Resolution Plan. We shall deal this issue along with other related issues in the subsequent discussions.

52. We note that under Chapter 8 of the Resolution Plan, the Respondent No. 2 bifurcated claims of homebuyers into following four categories:-

(i) Whose Possession has been handed over to Flat Owners.

(ii) Whose Possession of Flats to Flat Owners is pending as on CIRP date.

(iii) Cancelled Units (having valid Builder Buyer Agreement/ BBA).

(iv) Cancelled Units (not having valid BBA).

53. We note that homebuyers in the second category of homebuyers i.e., whose possession of flats are pending on the CIRP date, have an option either to cancel the units or to pay the balance amount and take possession after completion of the units. Further, in case if any homebuyer opts for cancellation of its units then the homebuyer is entitled to get a refund of 40% of the principal amount within 15 months from the effective date or within 6 months from the re-sale of the flats surrendered/cancelled by the Respondent No. 2, whichever is earlier.

54. We note that on the other hand, if the homebuyers fall in 4th category i.e., i.e., Cancelled Units (not having valid BBA), the homebuyers are entitled to receive only 5% of the principal amount and the payment to be made within 6 months from the Effective date.

55. We have noted that the Appellant has entered into agreement by way of MOU dated 24.05.2016 with the Corporate Debtor, whereby the Appellant agreed to purchase 25,000 sq. ft. area in the project. We note that no units were specified in the said MOU. The other salient feature of the MOU includes the consideration of Rs. 12.50 Crores for 25,000 sq. ft. area and further note that Rs. 10 Crores has already been paid by the Appellant. The MOU also mentioned that the Corporate Debtor shall arrange rent of the said area on behalf of the Appellant and the Corporate Debtor will ensure of rent of Rs. 15 Lakhs per month for the said area. MOU further provide that till such time 25,000 sq. ft. area is leased out, the Corporate Debtor shall pay an interest @ 18% per annum on the amount paid by the Appellant. MOU also provides the rights to the Appellant to terminate the MOU in case possession of the said area is not handed over to the Appellant by the date of possession and the amount would be refunded by the Corporate Debtor along with the interest @ 18% per annum.

Rest of the Clauses are standard legal clauses including representative, confidentiality, indemnification, waiver, notice, tax, dispute resolution, applicable laws, specific performance, etc.,

56. The relevant clauses of MOU which give more details and the intention of the parties, can be looked into and is reproduced as under :-

RECITALS

C. AND WHEREAS the Company has approached the Allottee with a proposal to transfer various shops/commercial units in the Project on upper ground floor of the Project aggregating to an area of approximately 25,000 sq. ft. approx. together with proportionate undivided, unidentified, impartible interest in the Said Plot underneath the said Project with rights to use of common areas and facilities in the Said Project(hereinafter referred to as the "Said Area") more specifically described in Annexure – I to this MOU and the Allottee has agreed to acquire the Said Area on terms and conditions set forth herein.

1. CONSIDERATION

1.1 The Company has agreed to sell, transfer and allot the Said Area on the upper ground floor of the Project, measuring approximately 25,000 sq. ft. approx. of super area, in the said Project on the Said Plot together with proportionate undivided, unidentified, impartible interest in the said Plot underneath the said Project with rights to use of common areas and facilities in the said Project more specifically described in Annexure – I to the Allottee and the Allottee hereby agrees to purchase the Said Area at the cost of Rs. 5,000/- (Rupees Five thousand only) per Sq. Ft. i.e. a total consideration of Rs. 12,50,00,000 - (Rupees Twelve Crore Fifty Lakh only) (hereinafter referred to as "Total Consideration")inclusive of all applicable taxes, duties, charges and all such other costs that may be made applicable of the Said Area including but not limited to the basic sale price, etc. and any other cost which may be made applicable in future. However, the liability of payment of Sales Tax /Vat, Service Tax as applicable shall be paid by the Allottee.

1.2 The Total Consideration includes the basic price for the Said Area which includes charges and payments on account of provision of hundred per cent (100%) power back up, external electrification and fire-fighting installations only. Costs on installation of electricity meter, security deposit, energizing charges etc. and other incidental charges payable directly in the name of the competent authority for registration and execution of conveyance deed of the Said Area and or for the registration of this MOU if so required, charges for provision of any other items/facilities which may or may not specifically be provided or mentioned in this MOU and may be required by any of the authorities or considered appropriate by the Company, any levies, taxes, cess like service tax, turnover tax/ VAT, etc or any other levies/taxes/cess imposed by the Central or State Government or any authorities shall be paid by the Buyer.

1.3 The Allottee has already paid an amount of Rs.10,00,00,000/- (Rupees Ten Crore only) (inclusive of taxes) after deducting applicable tax under section 194-IA of the Income Tax Act 1961 (Net amount- Rs. 9,90,00,000/- (Rupees Nine Crores Ninety Lakhs only) as per details below, as part payment towards the Total Consideration (hereinafter referred to as "Advance") and the receipt of which the Company hereby accepts and acknowledges.

S.NO.	Details of the Cheque	Amount (Rs.)
1	Ch. No. 71570 dated May 13, 2016 drawn on Union Bank of India, Karol Bagh, New Delhi.	9,40,00,000/-
2	Ch. No. 270432, dated November 8, 2014 drawn on Union Bank Of India, Karol Bagh, New Delhi	50,00,000/-
Total		9,90,00,000/-

2. TERMS OF MOU

2.1 The Parties agree that the possession of the Said Area shall be transferred and conveyed to and in favour of the Allottee by 31st December, 2017 ("Date of Possession") with all right and interest connected therewith to the Allottee. The said Date of Possession can be extended for a further period upon the mutual consent of the Parties.

2.4 The Company shall arrange renting of the Said Area on behalf of the Allottee and shall ensure that the rent at which the Said Area is leased shall be at least Rs. 60/- per sq. ft; i.e. Rs. 15,00,000/- per month for the Said Area. The Company hereby acknowledges and confirms that the amount of Total Consideration has been arrived at keeping in view that the rent to be fetched from the Said Area shall be at least Rs 60/- per sq. ft. per month. In the event the actual rent realized from the Said Area is different than Rs 60/- per sq. ft. per month, the amount of Total Consideration shall be adjusted in the following manner and the differential amount shall be adjusted/paid along with the Balance Consideration:

2.5 Till such time the Said Area is leased out in entirety, the Company shall pay an interest at the rate of 18% per annum to the Allottee on the amounts paid under this MoU to the Company for the period starting from execution hereof till the date on which the entire Said Area is leased out.

3. TERMINATION OF THIS MOU

3.1 The Parties have the right to terminate this MOU by mutual consent. In addition, the Allottee shall be entitled to terminate this MoU in case possession of the Said Area is not handed over to the Allottee by the Date of Possession. In the event of termination of

57. By reading both MOU and various definitions and provisions of RERA Act, it is seen that there has to be agreement to sale between the parties which is not found in the present case. We note that there is only an MOU dated 24.05.2016 which give description of 25,000 sq. ft. without any further elaboration regarding unit no., floors or any other details. Technically since the definition of allottee under Section 2(d) of the RERA Act is quite wide which include person to whom "apartments" has been allotted and definition of apartment is given in Section 2(e) of the RERA Act which is again very vide definition but which clearly indicate "means of separate and self contained part of any immovable property." Such 'separate and self contained' unit details is again not found in the present case as there is no separate or self contained part on any immovable property mentioned in the MOU.

58. We have already noted that recital 'C' clearly mention that "the said area more specifically describe in Annexure – I of this MOU" however, no Annexure-I has been produced by the Appellant. In this respect during pleadings, this Appellate Tribunal specifically asked the Appellant to link and produce the said Annexure I as mentioned in Recital C of the MOU, however, the Appellant could not do so and we therefore conclude that no specific units were mentioned by the

Corporate Debtor. The contention of the Appellant that the MOU should be treated at par with BBA or agreement to sale is therefore not found to be tenable.

59. We have already noted that Hon'ble Supreme Court of India in the judgments have laid down the ratio that the title or the nomenclature of the document may not be enough and the intention of the document is required to be looked into wile deciding the nature of the agreement. Here we have gone through the MOU carefully and also quoted the relevant portion in earlier discussion. We do not find any rational to treat the MOU at par with agreement to sale or BBA. Whenever, any unit, whether commercial or residential, is sold to allottee or homebuyers, the details of such property for which agreement to sale is executed is specified and may include, inter-alia, the name of allottee, payment details, unit details, area, rate, the adjacent unit directions, etc., to make it specific and distinguished unit. In contrast, in the present MOU there is no such details made available and only area of 25,000 sq. ft. @ 5000 per sq. i.e., Rs. 12.50 Crores is mentioned.

60. It is interesting to note that there is clause for rental of the properties by the Corporate Debtor @ 15 Lakhs per month failing which interest payment on the amount paid by the Corporate Debtor @ 18% per annum to the Appellant. Such clauses are not normal clauses in BBA or agreement of sale.

61. Normally and generally speaking, the typical BBA do not mention such financial rate of return or interest portion to be paid by the Corporate Debtor to

allottee. Even assuming that mention of rent and payment of interest in absence of finding suitable lease out of properties will not make the agreement to sale void or illegal, the other elements to establish that there were specific units sold to the Appellant are absent in the MOU.

62. The Appellant is also aggrieved by the fact that there are different categories of homebuyers who have been given different treatment in the approved Resolution Plan of Respondent No. 2. Although the Appellant submitted during pleadings that he is not challenging the approval of the Resolution Plan but merely challenging the fact that he has been placed in the 4th category i.e., "Cancelled Units (not having valid BBA)" and not in category 2nd i.e., "Whose Possession of Flats to Flat Owners is pending as on CIRP date". It has been brought out that if the Appellant would have been placed in category 2nd i.e., "Whose Possession of Flats to Flat Owners is pending as on CIRP date" he would have recieved 40% of amount paid whereas by finding himself in category 4 the Appellant will be merely getting 5% of the amount paid. We appreciate the grievances of the Appellant.

However, we note that the Appellant itself is a registered company under Companies Act, 1956 and itself Real Estate and Developer Company who knows the implications of buying and selling of properties and also understand the implications of legal documents and proper title deeds by way of document like

agreement to sale or BBA. Hence, the arguments of Appellant that the MOU should be treated at par with BBA or agreement to sale is not justifiable.

63. We note that there is suitable logic and rational in classification of homebuyers in 4 categories. The 1st category is applicable to those unit holders whose possession has been handed over. Next category is the unit holders whose possession of units is pending on CIRP dates. The 3rd category is for the unit holders having cancelled units but having valid BBA and last residual category is for all unit holders having cancelled units without any valid BBA. Thus, first three categories are having valid BBA whereas the last category does not as the valid BBA.

64. In Chapter 8th of the Resolution Plan, treatment of all these four categories of allottees, who are financial creditors as homebuyer as a class, have been detailed out which reads as under :-

	B) Class of Creditors (Allottees / Homebuyers / Flat Owners)	Creditors"), total claims filed by the 'unsecured Financial Creditors' other than the home buyers of the Company (the "unsecured Financial Creditors") is amount **to Rs. 10,80,00,000/-** out of which claims aggregating to **Rs. Nil** have been admitted for the purposes of CIRP by the Interim Resolution Professional ("Admitted unsecured Financial Debt") and the same are kept under verification. Since the IRP has not admitted these claims, the payment proposed for such **unsecured Financials Creditors (Other than Class of Creditors) shall be NIL.** ii. If any of the claims following under unsecured Financial Creditors (other than the class of Creditors) are admitted by the NCLT after the approval of Resolution Plan by the COC than RA proposes to settle such claims out of the contingent fund allocated in the Resolution Plan, **subject to a maximum of 1% of such admitted claim amount.** iii. Further, with respect to the amount payable to the Unsecured Financial Creditors categories (other than class of creditors) including accrued or unpaid interest arising after Insolvency Commencement Date and until the date of approval of the resolution plan by the Hon'ble Adjudicating Authority, if any, in relation to the Corporate Debtor will be written off in full and shall be deemed to be permanently extinguished on and with effect from the Effective Date and the Corporate Debtor or Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. iv. On and with effect from the Settlement Date, all Claims, debts and dues of the Unsecured Financial Creditors (other than class of creditors) shall stand satisfied in full and extinguished, and no Claim, debt or due shall subsist against the Corporate Debtor and the Resolution Applicant. v. In accordance with the forgoing, all claims (whether final or contingent, whether disputed or undisputed and whether or not notified to or claimed against the

		Corporate Debtor) of all the Unsecured Financial Creditors (other than class of creditors) of the Corporate Debtor shall stand fully and finally discharged & settled. vi. Any and all legal proceedings initiated before any forum by or on behalf of the Unsecured Financial Creditors categories (other than class of creditors), to enforce any rights or claims against the Corporate Debtor shall be deemed to be immediately, irrevocably and unconditionally withdrawn, and extinguished upon full payment to the Unsecured Financial Creditors categories (other than class of creditors) as envisaged in this Plan and in this regard, the Corporate Debtor / Resolution Applicant will file requisite application(s) before the appropriate forum(s) and the Unsecured Financial Creditors categories (other than class of creditors) shall be under an obligation to provide all necessary assistance and take steps to ensure the withdrawal/abatement of such legal proceedings. vii. **Treatment of Unsecured Financial Creditors [Class of Creditors (Allottees / Homebuyers / Flat Owners)]:** a. The Resolution Applicant will complete the pending construction work of the Project **within 15 months from the Effective Date.** For avoidance of doubt, it is hereby clarified that the scope of the work to be performed by the RA for the project "Cloud 9 Towers Vaishali" shall be strictly in accordance with the certified outstanding scope of work as provided by the Interim Resolution Professional which is annexed as **Annexure-2.** Upon completion of the aforementioned scope of work, the Project shall be deemed to be completed in all respects for the purposes of RA's obligation towards Project completion under this Resolution Plan. b. No additional scope of work shall be undertaken by the RA and no claims pertaining to the same shall be admissible to the RA. Considering the completion

		requires may require approvals from multiple government authorities, the Resolution Applicant **shall be given a grace period of 1_Quarters (3 months)** for completion of the project. By virtue of the order of the NCLT approving this Resolution Plan, the Corporate Debtor or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto for this delay. The RA shall keep the Monitoring Committee informed for the reasons of such delay, if any. **Note: The Resolution Applicant shall be given a grace period of 1_ Quarters (3 months) for completion of the project,** By virtue of the order of the NCLT approving this Resolution Plan, the Corporate Debtor or the Resolution Applicant shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto for this delay.*The purpose of submission of the resolution plan by the Resolution Applicant is to complete the Project and to hand over the possession & execution of registered sale deeds of the flats to the Home Buyers / Allottees.* c. The value of Claims of the Allottees / Home Buyers / Flat Owners, admitted by the IRP includes the principal payments of Consideration of Flats, accrued interest thereon and decree/ awards etc. Accordingly, it is proposed that only such admitted amount that constitutes the Principal Amount of the Consideration of the Flats *(the details of which is provided by the IRP under IM)*, shall be considered for the treatment under this Resolution Plan. Any interest / penal interest / compensation which may be payable to the Allottees / Home Buyers / Flat Owners or has been paid prior to the CIRP date by the Flat Owners as per any existing agreement will be treated as waived off. d. **Before submission of this Resolution Plan to COC,** any claim received from any person claiming to be Flat Owners / Allottees / Homebuyers of the

		Corporate Debtor, and have remained undecided till the date of approval from the CoC shall stand extinguished **from the date of the approval of this Plan by the Hon'ble NCLT,** and the Corporate Debtor or the Applicant or shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. e. Claims from the Class of Creditors which qualify as Flat Owner / Allottees / Home Buyers, if received **after the approval of Resolution Plan by the COC but before the approval of the Resolution Plan by the NCLT,** to the extent admitted by the NCLT, shall be considered as cancelled Flats and will be treated in accordance with the treatment for **'Cancelled Units (With Valid BBA)'** or **'Cancelled Units (Without Valid BBA)'** as the case may be. f. **After the approval of Resolution by the NCLT,** the rights of such Flat Owners / Allottees / Homebuyers, whose claim have not been accepted / not filedshall stand extinguished and the said property would be available to the Resolution Applicant for sale. g. Notwithstanding anything stated above, any claims received for the execution of the registered Sale Deed from the 'Flat Owners whose Possession have been handed over' shall be admitted / entertained by the RA/CD up to 90 days after the approval of Resolution Plan by the NCLT. h. **After the approval of this Resolution Plan by the NCLT,** other than the claims as specified above any and all other claims or demands made by or liabilities or obligations owed to or payable to (including any demand for any losses or damages, principal, interest, compound interest, penal interest, liquidated damages, or notional and other charges already accrued/ accruing or in connection with any third party claims) any actual or potential Claims for principle by Flat Owners from the Corporate

		Debtor, whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallised, known or unknown, disputed or undisputed, with or without court order, or any other adjudicating authority, present or future, whether or not set out in the balance sheet of the Corporate Debtor or the profit and loss account statements of the Corporate Debtor or the list of creditors, in relation to any period prior to the Plan Effective Date or arising on account of the acquisition of control by the Applicant over the Corporate Debtor pursuant to this Resolution Plan, will be written off in full and shall be deemed to be permanently extinguished by virtue of the order of the NCLT approving this Resolution Plan and the Corporate Debtor or the Applicant or shall at no point of time be, directly or indirectly, held responsible or liable in relation thereto. i. **On the basis of claims register received from the Interim Resolution Professional, the Resolution Applicant have bifurcated the claimants for the Class of Creditors into the following categories:** • **Whose Possession has been handed over to Flat Owners.** • **Whose Possession of flats to Flat Owners is pending as on CIRP date.** • **Cancelled Units (Having valid BBA).** • **Cancelled Units (not having valid BBA).** j. Detailed treatment for aforementioned categories of claimants are given herein below: I. **Whose Possession has been handed over to Flat Owners:** a. As the construction of balance work of the project including the common amenities would entail extra cost of construction, all the Flat Owners would be required pay an additional amount towards the C amount of the flats as most of the claims of the Flat Owners in this category are with respect to the pendency in common amenities. This amount

("Additional Consideration") will be in addition to the Consideration which has been mentioned in BBA signed between the Flat Owners and the Corporate Debtor. The estimate of the Additional Consideration is based on the assessment of the Cost of Construction as per the certified estimate by the IRP and the scope of work evaluated during RA's visit at the site of the CD and the overall financial viability of this Resolution Plan. The Additional Consideration shall be charged as follows -:

S.N	Category of Flat Owners	Additional Consideration to be paid
1	Iconic Towers & Duplex Flat Owners	INR 150/- per Sq. ft on the flat area
2	All Other Flat Owners – Residential Segment	INR 75/- per Sq. ft on the flat area
3	All Other Flat Owners – Commercial & Retail Segment	INR 150/- per Sq. ft on the flat area

b. Further, for such Flat Owners whose registration is pending, there shall be additional cost added to the Additional Consideration in lieu of the administrative efforts required to give effect to registered sale deed of the flat to the Flat Owners/Allottees/Home Buyers. This cost will be charged over and above the agreed amount payable as per respective allotment letters / Builder Buyer Agreement / Flat Buyers' agreement (BBA) whose registered sale deed is pending. This fee is proposed to be charged at the rate of **Rs. 85,000/- plus applicable taxes**, per registered sale deed, if any, from the Flat Owners / Home Buyers / Allottees (Residential & Commercial).

II. Whose Possession of flats to Flat Owners is pending as on CIRP date:

a. As the construction of balance work of the project including the amenities would entail extra cost of construction, all the Flat Owners would pay additional amount towards the consideration amount of the flats. This amount will be in addition to the consideration amount which has been mentioned in BBA signed between the Flat Owners and the Corporate Debtor. The Cost of Construction as per the estimate and the scope of work evaluated during RA's visit at the site of the CD and interactions with the IRP may go upto INR 20 Crores including administration costs:

S.N	Category of Flat Owners	Additional Consideration to be paid
1	Iconic Towers & Duplex Flat Owners	INR 150/- per Sq. ft on the flat area
2	All Other Flat Owners – Residential	INR 75/- per Sq. ft on the flat area
3	All Other Flat Owners – Commercial & Retail	INR 150/- per Sq. ft on the flat area

b. Further, for such Flat Owners whose registration is pending, shall be additional cost to give effect to registration of the flat to the Flat Owners / Allottees / Home Buyers. This cost will be charged over and above the agreed amount payable as per respective allotment letters / Builder Buyer Agreement / Flat Buyers' agreement (BBA) whose registration is pending. The RA will charge an administration fee of **Rs. 85,000/- plus applicable taxes,** if any, per registration from the Flat Owners / Home Buyers / Allottees (Residential & Commercial).

c. Further, the Flat Owners, whose any part of the payment for the Consideration of the Flat is pending as per original BBA irrespective of **whether** such

outstanding was due or not due on CIRP date, shall be obligated to make payment of such outstanding part of the Consideration including any applicable taxes amount along with the total Additional Consideration, if any. Such payments shall be required to be paid within 30 days of such Consideration amount and the Additional Consideration amount, as the case may be, being demanded by the CD post the Effective Date.

d. The Flat owners shall be required to deposit / pay the outstanding dues / amounts, within 30 days from the Demand Date as demanded by the Resolution Applicant/ Corporate Debtor. In case payment is not made as per schedule, such payments can be within 90 days from the Demand Date, with an interest of 18% p.a.

e. If the payments are not made as demanded at the end of the 90 days or upon a request received from the Flat Owner, the Resolution Applicant shall be entitled to cancel the allotment after due notice period of not exceeding 30 days and the units shall be available to it as unsold unit immediately upon such cancellation.

f. Upon cancellation of such allotment, Allottees / Flat Owners will be entitled to receive a refund after completion of project, 40% of principal amount paid within 15 months from the effective date by the Resolution Applicant or within 06 months from the re-sale of the Flats surrendered/ cancelled by the RA, whichever is earlier.

III. Cancelled Units (Having valid BBA):

a. The Flat Owners whose claims have been admitted but their allotted Flats were cancelled by the CD, for any reason whatsoever, and have been re-allotted to other Flat Owners, their claims shall be settled as follows:

		◦ Only the Principal Amount out of the total claim admitted shall be considered. • Such Flat Owners shall have the option to purchase any available / unsold inventory of the CD of the size equal to or more than the original flat purchased at a price which shall be the price of the original allotment and increased by Rs. 1,000 / sq. ft for the Flat area. The flat owners shall exercise the said option within 60 days from the Effective Date. • In the event the such Flat Owners does not exercise the given right under clause (b) above, his / her claim shall be settled by payment of 40% of Principal Amount admitted by the IRP and the payment to these Flat Owners will be made within 09 months from the Effective Date. • In cases where the Flat Owners is eligible for the refund as above and such Flats allotted to them were subject to any credit facility extended by Banks / Financial Institutions, shall refund shall only be issued upon production of NOC from the Banks / Financial Institutions by such Flat Owners. It is hereby expressly clarified that any claims, rights, etc., of any Banks/F.I. on any such Flats/ Units shall stand extinguished on approval of Resolution Plan by the NCLT. b. The Flat Owners who booked more than one flat and opt to surrender the additional Flats / Units, these Allottees / Flat Owners will be entitled to receive within 15 months from the effective date or within 6 months from the resale of the flats, whichever is earlier, for their respective flat(s) 40% of principal amount paid. The surrendered/ cancelled flat(s) will be available to the Resolution Applicant for sale and payment will be made after sale of the thus surrendered flat. The payment against these additional number/s of flats will be adjusted against the one flat which the Flat Owner decides to retain. **IV. Cancelled Units (not having valid BBA):**

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		a.	The claimant who does not have valid BBA and their claims are admitted by the IRP as Flat Owners or whose allotted Units is not available in the Project of the CD and their claim is admitted by the IRP, would be paid, 5% of principal amount paid and the payment to these home buyers will be made within 06 months from the Effective Date.

65. Suffice to note that adequate justification of such classification has been given along with treatment to be made to different categories and cannot be treated as illegal or on the wrong side of law by any logic.

66. We also note that the commercial wisdom of the CoC cannot be challenged as stipulated in several judgments of this Appellate Tribunal as well as Hon'ble Supreme Court of India. In this connection we note that the COC has voted in favour of the Resolution Plan of Respondent No. 2 by 100% voting rights. At this juncture, it is significant to point out that the homebuyers as a class have also voted in favour of the Resolution Plan and thus any single homebuyer cannot be allowed to challenge the same.

We will also refer to the judgement passed by Hon'ble Supreme Court of India in case of ***Essar Steel India (Supra)***. The relevant portion of the said judgment is read as under :-

> *"88. By reading paragraph 77 (of Swiss Ribbons) dehors the earlier paragraphs, the Appellate Tribunal has fallen into*

grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may

involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."

(Emphasis Supplied)

67. From above judgment of ***Essar Steel India (Supra)***, it is clear that once the CoC approves the Resolution Plan by the requisite majority, the same cannot be challenged by any individual unit buyer/ homebuyer like the Appellant in the present appeal.

68. We note that the Hon'ble Supreme Court of India in the case of ***Jaypee Kensington (Supra)*** has given a clear ruling that no individual homebuyers has any locus to challenge resolution plan if the Resolution Plan which has been approved by voting of more than 50% of voting shares of homebuyers as a class. The relevant part of the judgment reads as under :-

"210.5. Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the Financial Creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote the Resolution Plan. It is obvious that if this

finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a Plan of Resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the Resolution Plan and binding nature of the vote of authorised representative on the entire class of the Financial Creditor(s) he represents.

210.6. To put it in more clear terms qua the homebuyers, the operation of sub-Section (3-A) of Section 25-A of the Code is that their authorised representative is required to vote on the Resolution plan is accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyer; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.

218. To sum up this part of discussion, in our view, after approval of the Resolution Plan of NBCC by CoC, where

homebuyers as a class assented to the Plan, any individual homebuyer or association cannot maintain any challenge to the Resolution Plan nor could be treated as carrying any legal grievance."

(Emphasis Supplied)

69. This makes absolutely clear that the Resolution Plan may provide different categories of creditors and different payment schemes, as seen in the present case which is valid and legally enforceable. The ratio of the above judgment is very explicit and clear and therefore we find that the Appellant has no locus in the present appeal to challenge the Resolution Plan or his classification in category 4 of the Resolution Plan on his own as individual homebuyer/ allottees.

70. As regard the plea of the Appellant that his claims were accepted by the Respondent No. 1 initially as homebuyer and the Respondents erred in classifying his claims in category 4 subsequently and therefore, the Impugned Order approving the Resolution Plan in classifying him into category 4 is perverse.

In this connection, we note the relevant portion of this Appellate Tribunal earlier order in the case of Fervent Synergies Ltd. (Supra) which reads as under:-

...15. The question which needs to be answered in the present case is whether the doctrine of promissory estoppel can be pressed in respect to a Resolution Plan, which is submitted by Resolution Applicant and approved by the CoC in its commercial wisdom. The submission of the learned Counsel for the Appellant is founded on the ground that the RP has admitted its claim of 10 flats as communicated vide email

dated 30.06.2021. Acceptance or admission of the claim of a Financial Creditor including homebuyers is one aspect of the scheme under the IBC. Subsequent steps in the IBC including the preparation of Resolution Plan are based on the list of Creditors, admitted claims of the Creditors etc. as per the scheme of the IBC, but the principle of promissory estoppel cannot be pressed against the Resolution Applicant, who submits Resolution Plan on the basis of relying on the Information Memorandum, the list of Creditors and other aspect of the matter. The Resolution Applicant has not extended any promise to the Financial Creditors of the Corporate Debtor that the claim submitted by Financial Creditor or any other creditor shall be accepted in toto. The mandatory contents of the Resolution Plan are laid down in the CIRP Regulations, 2016. If a Resolution Plan is compliant with the provision of Section 30, sub-Section (2) of the IBC and the provisions of the Regulations, 2016, the Plan cannot be faulted on the ground of the promissory estoppel, which the Appellant is pressing against the Resolution Professional, who has admitted the claim. We, thus, are of the view that submission of the Appellant based on the doctrine of promissory estoppel cannot be pressed into service in reference to the Resolution Plan, which has been submitted by a Resolution Applicant and approved by the CoC in its commercial wisdom. We, thus, do not find any merit in the submissions of learned Counsel for the Appellant on the basis of promissory estoppel.

(Emphasis Supplied)

Above judgment does not support the cause of the Appellant.

71. In view of above detailed discussions, we do not find any merit in the appeal. The appeal devoid of any merit stand dismissed. No Costs. Interlocutory Application(s), if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

Sim