

IN THE NATIONAL COMPANY LAW TRIBUNAL AT
ALLAHABAD BENCH

CA NO.26/2018

(Application under Section 66, 43, 45 & 60(5)(a) of the Insolvency &
Bankruptcy Code, 2016)

IN

COMPANY PETITION NO.(IB)77/ALD/2017

(Application under Section 7 of the Insolvency & Bankruptcy
Code, 2016)

IN THE MATTER OF

IDBI BANK LIMITED.

..... FINANCIAL CREDITOR

VERSUS

JAYPEE INFRATECH LIMITED.

..... CORPORATE DEBTOR

AND

IN THE MATTER OF

MR. ANUJ JAIN,
RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LTD.

..... APPLICANT

VERSUS

1. MANOJ GAUR
MANAGING DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.1

2. SAMEER GAUR
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.2

3. RAKESH SHARMA
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.3



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4. SUNIL KUMAR SHARMA
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.4

5. BASANT KUMAR GOSWAMI
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.5

6. LALIT BHASIN
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.6

7. SHAM LAL MOHAN
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.7

8. BRIJ BEHARI TANDON
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.8



9. REKHA DIXIT
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.9

10. SHANTI SARUP GUPTA
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.10

11. KESHAV PRASAD RAU
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.11

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12.SUNDARAM BALASUBRAMANIAN
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.12

13.PRAMOD KUMAR AGGARWAL
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.13

14.MOHINDER PAUL KHARBANDA
DIRECTOR
JAYPEE INFRATECH LTD
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.14

15.JAI PRAKASH ASSOCIATES LTD
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT :-
SECTOR-128, NOIDA
UTTAR PRADESH – 201 304

...RESPONDENT NO.15

16.ALLAHABAD BANK
INDUSTRIAL FINANCE BRANCH
1ST FLOOR, 17 PARLIAMENT STREET
NEW DELHI – 110 001

...RESPONDENT NO.16

17.THE KARUR VYASYA BANK LIMITED
882, MASTER PRITHVINATH MARG
EAST PARK ROAD
OPP. AJMAL KHAN PARK
KAROL BAGH
NEW DELHI – 110 005

...RESPONDENT NO.17

18.AXIS BANK LIMITED
2ND FLOOR, RED FORT CAPITAL PARSWANATH TOWER
BHAI VEER SINGH MARG
GOLE MARKET
NEW DELHI – 110 001

...RESPONDENT NO.18

19.THE LAKSHMI VILAS BANK LIMITED
TOLSTOY HOUSE
TOLSTOY MARG, JANPATH
NEW DELHI – 110 001

...RESPONDENT NO.19



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20.BANK OF INDIA

AHMEDABAD LARGE CORPORATE BRANCH
2ND FLOOR, BANK OF INDIA BUILDING BHADRA
AHMEDABAD – 380 001

...RESPONDENT NO.20

21.LIFE INSURANCE CORPORATION OF INDIA

YOGAKESHEMA, CENTRAL OFFICE
INVESTMENT DEPARTMENT (M&A)
6TH FLOOR (EAST WING)
JEEVAN BIMA MARG
MUMBAI – 400 021

...RESPONDENT NO.21

22.BANK OF MAHARASHTRA

A-13, SOUTH EXTENSION – 1
RING ROAD
NEW DELHI – 110 049

...RESPONDENT NO.22

23.L&T INFRASTRUCTURE FINANCE COMPANY LIMITED

6TH FLOOR, DCM BUILDING
16, BARAKHAMBHA ROAD
CONNAUGHT PLACE
NEW DELHI – 110 001

...RESPONDENT NO.23

24.CANARA BANK

PRIME CORPORATE BRANCH-I
NEHRU PLACE, 1ST FLOOR
NO. 1 DDA BUILDING
NEW DELHI – 110 019

...RESPONDENT NO.24

25.ORIENTAL BANK OF COMMERCE

LARGE CORPORATE BRANCH
1ST FLOOR HARSHA BHAWAN
E-BLOCK
CONNAUGHT PLACE
NEW DELHI – 110 001

...RESPONDENT NO.25

26.CENTRAL BANK OF INDIA

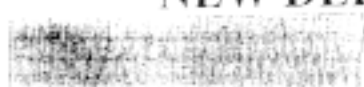
CORPORATE FINANCE BRANCH
5, JEEVAN TARA BUILDING
PARLIAMENT STREET
NEW DELHI – 110 001

...RESPONDENT NO.26

27.STATE BANK OF BIKANER & JAIPUR

COMMERCIAL BRANCH
101-102, HOUSE 27
BARAKHAMBHA ROAD
NEW DELHI – 110 001

...RESPONDENT NO.27



28.CORPORATION BANK

NEW BUILDING M/S MGF AUTOMOBILES LTD.
NO. 1 FAIZ ROAD, JHANDEWALAN
NEW DELHI

...RESPONDENT NO.28

29.STATE BANK OF INDIA

A COMPANY INCORPORATED UNDER COMPANIES ACT, 1956
CORPORATE ACCOUNTS GROUP-II
RED FORT CAPITAL
4TH & 5TH FLOOR, PARASNATH TOWERS
BHAIR VEER SINGH MARG
NEAR SPEED POST OFFICE, GOLE MARKET
NEW DELHI – 110 001

...RESPONDENT NO.29

30.EXPORT – IMPORT BANK OF INDIA

GROUND FLOOR
STATESMAN HOUSE, 148
BARAKHAMBRA ROAD
NEW DELHI – 110 001

...RESPONDENT NO.30

31.STATE BANK OF HYDERABAD

COMMERCIAL BRANCH, 74, JANPATH,
NEW DELHI - 110 001

...RESPONDENT NO.31

32.ICICI BANK LIMITED

ICICI BANKTOWERS
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI – 400 051

...RESPONDENT NO.32

33.STATE BANK OF TRAVANCORE

SBT HOUSE, 18/4
2ND FLOOR, ARYA SAMAJ ROAD
KAROL BAGH
NEW DELHI - 110 005

...RESPONDENT NO.33

34.IDBI BANK LIMITED

IDBI TOWER, WORLD TRADE COMPLEX
CUFFE PARADE
MUMBAI – 400 005

...RESPONDENT NO.34

35.UCO BANK

FLAGSHIP CORPORATE CENTRE
5, PARLIAMENT STREET
NEW DELHI – 110001

...RESPONDENT NO.35

36.IFCI LIMITED

IFCI TOWER
61, NEHRU PLACE
NEW DELHI – 400 005



37.UNITED BANK OF INDIA
CORPORATE FINANCE BRANCH
106-109, ANSAL TOWER
38, NEHRU PLACE
NEW DELHI – 110 019

...RESPONDENT NO.37

38.THE JAMMU AND KASHMIR BANK LIMITED
63-D, BASANT LOK
VASANT VIHAR
NEW DELHI – 110 057

...RESPONDENT NO.38

39.THE KARNATAKA BANK LIMITED
K-38, CHAUDHARY BUILDING
OUTER CIRCLE, CONNAUGHT PLACE
NEW DELHI – 110 001

...RESPONDENT NO.39

40.THE SOUTH INDIAN BANK LIMITED
CORPORATE BRANCH HYDERABAD
7-3-805/D/G1, GROUND FLOOR
DEGA TOWER, SOMAJIGUDA
HYDERABAD – 500 082

...RESPONDENT NO.40

41.YES BANK LIMITED
48, NYAYA MARG, CHANAKYA PURI
NEW DELHI – 110 021

...RESPONDENT NO.41

42.STANDARD CHARTERED BANK
BRANCH OFFICE AT
NARAIN MANZIL, 23 BARAKHAMBA ROAD,
NEW DELHI 110 001

...RESPONDENT NO.42



[Signature]

JUDGMENT/ORDER DELIVERED ON 16.05.2018

CORAM : SH. V.P SINGH, MEMBER (J)
MS. SAROJ RAJWARE, MEMBER (T)

For the Applicant/RP : Sh. Sudhanshu Batra, Sr. Adv.
Along with Sh. Abhishek Anand,
Advocate & Ms. Honey Satpal, Advocate

For the Res. No.1, 2, 3, 4, 9, 13 & 14 : Sh. Abhay Singh, Advocate.
For the Res. No.5, 8, & 10, 11 & 12 : Sh. Sudeep Harkauli, Advocate.
For the Res. No.15 : Sh. R.P. Agarwal, Advocate.
For the Res. No.16 : Sh. Tarun Verma, Advocate.
For the Res. No.17 : Sh. Vijay Kumar, Advocate.
For the Res. No.18 : Sh. Abhijnan Jha along with
Sh. Swetashwa Aggarwal, Advocates.
For the Res. No.19 & 22 : Sh. Yash Tandon, Advocate.
For the Res. No.26 : Ms. Gunjan Jadwani, Advocate.

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For the Res. No.30

: Ms. Gunjan Jadwani along with
Sh. Madhav Kanoria & Sh. Shantanu
Chaturvedi, Advocates.

For the Res. No.32

: Sh. Anurag Khanna, Sr. Adv. Along with
Sh. Madhav Kanoria, Adv.
Sh. Shantanu Chaturvedi, Adv.
Ms. Gunjan Jadwani, Adv.

For the Res. No.36

: Sh. O.P. Mishra, Advocate.


For the Res. No.42

: Sh. Manish Goyal along with
Sh. Abhinav Chopra, Ms. Priyanka
Midha, Sh. Parag Manini & Sh. Ram
Kaushik, Advocates.

PER SE

: SH. V.P. SINGH, MEMBER (J)

JUDGMENT/ORDER



This company application has been filed by the Resolution Professional in case of Jaypee Infratech Ltd., under section 43, 45 and 60(5)(a), 66 read with section 25(2)(J) of the Insolvency and Bankruptcy Code, 2016 for seeking direction that the transaction entered into by the promoters and Directors of the Corporate Debtor creating mortgage of 858 acres of immovable property owned and in possession of the Corporate Debtor, to secure the debt of related party i.e. Jaiprakash Associates Ltd., by way of mortgage deeds dated 29th December, 2016, 12th May, 2014, 7th March, 2017, 24th May, 2016 and 4th March, 2016 are the fraudulent and wrongful transactions within the meaning of Section 66 of the Code.

The directions have been further sought against the Directors and promoters of the Corporate Debtor to make such contributions to the assets of the Corporate Debtor as it may deem fit, including directions under Section 67 of the code.

The directions have been sought under section 48(1)(c) of the Code directing the lenders of Jaiprakash Associates Ltd. in whose favour mortgage of 858 acres of land has been created to release or discharge security interest created by the



corporate debtor over its immovable properties towards the financial assistance granted to Jaiprakash Associates Ltd.

The directions have been sought for declaring the transactions in question as Preferential transactions under section 43 of the code and pass an order under Section 44 in particular under sub-section (1)(c) thereof against the lenders of the Jaiprakash Associates Ltd. in whose favour mortgage of 858 acres of land has been created to release or discharge security interest Created by the Corporate Debtor over its immovable properties towards the financial assistance granted to Jaiprakash Associates Ltd.



The petitioner contends that this Tribunal vide its order dated 9th August 2017 admitted the Company Petition no. (IB)77/ALD/2017 filed on behalf of the Financial Creditor, i.e. IDBI Bank Ltd. against Jaypee Infratech Ltd. (from now on will be referred as the “corporate debtor” for initiating the Corporate Insolvency Resolution Process under section 7 of the Insolvency and Bankruptcy Code 2016). The Tribunal appointed the applicant as the Interim Resolution Professional of the Corporate Debtor.

The petitioner contends that sub regulation (2) of the Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of corporate persons) Regulations, 2016 requires the Resolution Professional to submit to the Committee of Creditors, all details of the transactions, if any, which falls under section 43, 45, 50 and 66 of the Code. The sub regulation (2) of the Regulation 39 is given below;

39- Approval of resolution plan—

6[(2) The resolution professional shall submit to the committee, all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of

following transactions, if any, observed, found or determined by him:—

- a) preferential transactions under Section 43;
- b) undervalued transactions under Section 45;
- c) extortionate credit transactions under Section 50; and
- d) fraudulent transactions under Section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.]

The sub-section (1) of Section 25 casts a duty upon the Resolution Professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. For this purpose, clause (J) of sub-section (2) of section 25 casts duty upon the resolution professional to apply for the avoidance of any such transaction before the Adjudicating Authority by Chapter III of the Code. Sections 43, 45 and 50 of chapter III deal with the preferential transactions, undervalued transactions and extortionate credit transactions respectively. Section 66 casts duty on the Resolution Professional to apply to the Adjudicating Authority in respect of fraudulent and wrongful transactions.



Petitioner contends that while performing his duties and functions as the Resolution Professional of the Corporate Debtor, and conducting the affairs and business of the Corporate Debtor, on examination of various transactions entered into by the corporate debtor and its promoters shareholders of the company and their Directors, the applicant has found that the business of the corporate debtor has been carried on with the intent to defraud the creditors of the Corporate Debtor and for the fraudulent purpose. The Directors of the corporate debtor did not exercise care or due diligence in minimising the potential loss to the creditors knowing and being fully aware of the financial stress the corporate debtor was going through (having been declared an NPA by the guidelines of RBI). The transactions referred herein

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also amount to being undervalued and preferential transaction under chapter III of The Code.

The Corporate Debtor Company is a special-purpose company promoted by JAL for the design, engineering, construction of six lanes 165 km long Yamuna Expressway between Noida and Agra. In addition to the development of the Expressway, The Corporate Debtor, as Concessionaire, was also granted rights to develop 25 million square meters of land along the Yamuna Expressway and Noida at 5 Locations for Residential, Commercial, Amusement, Industrial and Institutional use.

The Corporate Debtor launched various projects (including group housing and plots) in Noida (LFD 1), Mirzapur (LFD- 3) and Agra (LFD-5). A total of 32,962 units were sold across these three land parcels, and an amount of ₹13,569 crores was collected from the flat buyers as on 13 August 2017, comprising collection from Noida projects of ₹13,123 crores, collection from Mirzapur projects ₹423 crores and collection from Agra projects of ₹23 crores. The project in Noida was scheduled to be completed during the calendar year 2013 & 14, except two projects for which the scheduled completion date, was during the calendar year 2016 (2742 units) and 2018 (3284 units). The individual project completion ranged from 17% to 80%. Further, out of total 250 towers, structure work is going on 66 towers, and finishing work is ongoing in 148 towers, whereas 36 towers had been delivered. As per the revised schedule submitted by the Corporate Debtor with the RERA authorities, the projects in Noida Wish Town was scheduled to be handed over to the flat buyers over the next 3 to 4 years, i.e. until 2021. Corresponding to the amount collected from the customers in the Noida projects, an amount of approximately ₹8600 crores has been



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incurred on the projects, and balance cost of ₹8756 crores is yet to be incurred for completion.

Since the incorporation of the Corporate Debtor, an amount of approximately ₹15,900 crores have been paid to Jaiprakash Associates Ltd. (the holding company and the principal contractor of the Corporate Debtor) towards the various construction activities, expenses etc. undertaken by Jaiprakash Associates Ltd. (i.e. construction of the real estate projects and Yamuna Expressway Toll).

The petitioner contends that the Corporate Debtor has the outstanding liability of approximately ₹132 crores payable to 7451 Retail Fixed Deposit Holders as on 9th August 2017. The fixed deposits were raised from the public under the provision of Companies Act, 1956. Subsequently, these are required to be repaid in full as the FD programme was not covered by the new Companies Act 2013. Given the cash crunch, the company has not yet repaid the FD holders. The repayment to FD holders

also being monitored by this Tribunal in an ongoing matter.



Petitioner further contends that the Corporate Debtor started facing financial stress and could not honour its project completion deadlines and failed in its commitment to deliver possession of flat to homebuyers in time. It started facing litigation from flat buyers in some forums it also started defaulting in payments of loans and other financial assistance borrowed from financial creditors. It's account was declared as a **Non-Performing Account (from now on NPA)** as on 30th September 2015 by Life Insurance Corporation and on 31st March 2016 by other lenders. It is obvious that the Corporate Debtor was in dire needs of funds during this period and was facing severe liquidity crunch to complete the construction of projects and deliver the flats to homebuyers as well as honour the payment obligations to Financial Creditors including the Fixed Deposit Holders. The

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Corporate Debtor owns various pieces of unencumbered land which was/is available to be liquidated or offered as security to raise finance to complete the construction of flats and deliver possession of flats to the homebuyers.

The applicant Resolution Professional contends that while performing his duties under the Code, the applicant discovered that, right in the middle of its immense financial crunch and while continuing to default to homebuyers and Financial Creditors and even after it had been declared as NPA, the Directors of the Corporate Debtor, in utter disregard to fiduciary duties and duty of care to the creditors of the Corporate Debtor, mortgaged 858 acres of unencumbered land owned by the Corporate Debtor to secure the debt of the related party i.e. Jaiprakash Associates Ltd (hereinafter, "JAL"). The value of the land mortgaged by the Corporate Debtor was estimated to be in the range of ₹5000 to 6000 crores



approximately, as per the valuation report prepared at the time of mortgage of the said land. **The mortgage of land was created without any counter guarantee from a related party.** The mortgage of land is in nature of asset stripping and

entered into with intent to defraud the creditors of the Corporate Debtor. It is pertinent to state that as per sub-section (10) of Section 3 of the Code, "creditor" consist of 3 classes of creditors-Financial Creditors, Operational Creditors and creditors other than Financial and Operational Creditors. The CIRP Regulations require the creditors other than the Financial and Operational Creditors to file proof of claim in form-F. The homebuyers and the Fixed Deposit Holders are also Creditors of the Corporate Debtor.

The applicant contends that JAL is a holding company, owing 995,000,000 number of shares of Corporate Debtor as on 31st March 2017, JAL is a related party within the meaning of Section 2(24) of the Companies Act, 2013 and promoter of

the Corporate Debtor within the meaning of Section 2(69) of Companies Act, 2013.

The applicant further contends that mortgage of land by the company to its related party may not be forbidden under law, it becomes questionable if it has been done in complete disregard to the interest of the creditors and stakeholders of such company, results in asset stripping, and is done without protecting the interest of the company and its stakeholders, even without securing or obtaining any counter guarantee in return. The mortgage of 858 acres of land, valued at approximately ₹5000-6000 crores, by the Directors of the Corporate Debtor to secure the debt of JAL, at the time when the Corporate Debtor itself was in dire need of funds and could have sold/mortgaged unencumbered land to raise funds to complete construction of flats in a timely manner and to fulfil its obligation to its creditors and prevent value deterioration or erosion or insolvency is highly questionable. Therefore, as soon



the applicant discovered the transaction, the applicant vide its letter dated 5th December, 2017 requested JAL to provide documents concerning the transaction entered between the Corporate Debtor, JAL and the banks about the immovable properties of the Corporate Debtor.

The applicant vide its letter dated 29th December 2017 called upon the lenders of JAL in whose favour mortgage of land has been created to provide full disclosure, explanation in respect of transaction as explained above keeping in view of the relevant provisions of the Code. The lenders of JAL denied that the transactions are covered by the provisions of Section 43, 45, 50 and 66 of the Code. In its reply dated 22nd January, 2018, JAL failed to provide any explanation or justification.

That on examination of records of the Corporate Debtor accessible to the applicant, the applicant could not find any approvals obtained from the Lenders of

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the Corporate Debtor to mortgage its immovable properties as detailed above in favour of lenders of a related party, i.e. JAL. While nominees for lender attended the Board meeting of the Corporate Debtor in which the decision to mortgage the land was taken, but that cannot be treated as approval/no objection of lenders. The lenders invariably have covenants in loan agreement that require their approval to be obtained for creating interest in favour of any one of the unencumbered assets of the borrower. Further, on examination of the records, the applicant has also reason to believe that no shareholders' approval was obtained to mortgage the land of the corporate debtor in favour of the lenders of JAL. It is pertinent to note that when the mortgage was created, the Corporate Debtor was already in default to its lenders and it is unlikely that the Lenders of Corporate Debtor would have provided no objection to creation of mortgage to secure debt of related party as that would have compromised recovery of not only their dues but also the interest of thousands of home buyers waiting for their flats in which their hard earned monies have been invested. The same for fixed deposit holders.



The applicant contends that the said transactions of the creation of mortgage of 8.28 acres of land to secure the debt of related party is a fraudulent and wrongful transaction under section 66 of the Code as it has been carried on with the intent to defraud the creditors of the Corporate Debtor.

The applicant contends that as per sub-section (10) of Section 3 of the Code, "Creditor" means any person to whom a debt is owed and includes a Financial Creditor and Operational Creditor, Secured Creditor, an Unsecured Creditor and a Decree Holder. Therefore, it broadly creates three classes of Creditors-Financial Creditors, Operational Creditors and Creditors other than Financial and Operational

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Creditors, while the banks, financial institutions and fixed deposit holders of the Corporate Debtor are Financial Creditors.

The Corporate Debtor was facing financial stress and was unable to honour its project completion deadlines and failed in its commitment to deliver possession of flats to homebuyers in time. It was facing litigation from flat buyers in some forums. The Corporate Debtor has approximately 30,000 flats under construction and once the promoters and Directors of the Corporate Debtor were aware of the financial stress since 30th September 2015 and to undertake such transaction to create an interest in its immovable property for financial assistance to its related party has been entered to defraud the Creditors of the Corporate Debtor and the homebuyers at large. It had also defaulted in payment of loans and other financial assistance borrowed from Financial Creditors, including Fixed Deposit Holders. The mortgage was created in complete disregard to the interests of the Creditors and Stakeholders of the Corporate Debtor and the homebuyers at large. Its account was declared as a non-performing account (from now on "NPA") on 30th September 2015 by LIC and on 31st March 2016 by the lenders. The Corporate Debtor was in dire needs of funds during this period and was facing severe liquidity crunch to complete the construction of projects and deliver the flats to homebuyers, as well as honour the payment obligation to financial creditors including the fixed deposit holders. Since the Corporate Debtor itself was in dire need of funds and could have sold/mortgaged unencumbered land to raise funds to complete construction of flats in a timely manner and to fulfil its obligation to its creditors and prevent value deterioration or insolvency is highly questionable. But, it chose to give away the land to secure the debt for a related party. The mortgage was created in complete disregard to the interest of the creditors and stakeholders of the Corporate Debtor. Now JAL



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has defaulted to its lenders exposing the mortgaged land to the risk of being sold to recover the dues payable by JAL.

The sub-section (1) of Section 66 of the Code provides that if during the CIRP, it is found that any business of the Corporate Debtor has been carried on with the intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose, the Tribunal may on application of the Resolution Professional pass an order directing any persons who were knowingly parties to carry on the business in such manner shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit. Sub-section (2) of Section 66 states that if before the insolvency commencement date, a Director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor; and such Director or partner did not exercise due diligence in minimising the potential loss to the creditors of the Corporate Debtor, such director shall be liable to make such contribution to the assets of the Corporate Debtor.



Admittedly Directors of the Corporate Debtor and its related party, i.e. JAL were well aware of the fact that the Corporate Debtor was in default of the Financial Creditors, Operational Creditors, Creditors (including homebuyers) and other stakeholders. The Directors were aware that they had been declared as NPA by LIC and other creditors. They were defaulting in timely construction, completion and delivery of flats to homebuyers. There were further defaulting payment to the fixed deposit holders. Therefore, the Directors of the Corporate Debtor were fully aware that they were in the twilight zone and insolvency was imminent. The Corporate Debtor ought to have exercised due diligence in minimizing the potential loss to the Financial Creditors, Operational Creditors, creditors (including home buyers) and

other stakeholders of the Corporate Debtor. However, evidently the Directors of the Corporate Debtor despite being fully aware of the said factum of default, admittedly failed to exercise due diligence in minimising the potential loss to its creditors and entered a transaction which on face-of it, is a transaction entered to give benefits to its related party with a clear intent to defraud its creditors. This land could have been sold today to generate cash that would have been sufficient to complete the construction of flats. The flat buyers are directly affected adversely by this decision.

Applicant further contends that the said transaction of the creation of mortgage constitute an undervalued transaction within the meaning of sub-section (2)(b) of Section 45 of the Code as it is made without any consideration of economic gain and had not taken place in the ordinary course of business of the Corporate Debtor.



The applicant states that transaction shall be considered undervalued where the Corporate Debtor enters into a transaction with a person which involves transfer of one or more assets by the Corporate Debtor for a consideration, the value of which is significantly less than the value of consideration provided by the Corporate Debtor and such transaction has not taken place in the ordinary course of business.

In the instant case, the Directors of the Corporate Debtor, despite the Corporate Debtor being in default to its creditors agreed to give away 858 acres of prime land with estimated value then ranging between ₹5000 to 6000 crores to secure the debt of a related party without any consideration or economic gain. The transactions of the creation of mortgage had been made within two years of the insolvency commencement date, i.e. 9th August 2017.

The Resolution Professional further contends that if the said transaction is viewed after piercing the corporate veil, it would be found that the said transaction

is a preferential transaction within the meaning of such sub-section (2) of Section 43 of the Code.

Sub-section (2) of section 43 provides that if the Resolution Professional is of the opinion that the corporate debtor has at a relevant time given preference in such transaction and such manner as laid down in sub-section (2) to any person is referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in Section 44.

Applicant has contended that section 43(1) of the Code provides that a corporate debtor shall be deemed to have given preference if there is any interest created over property of the corporate debtor for the benefit of a creditor and has the effect of putting such creditor in the beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53 of the Code. In the instant case, the Directors of the Corporate Debtor have created an interest over the immovable properties as security in favour of the lenders of JAL, its holding company, for the benefit of JAL and its creditors and have put the Creditors of the Corporate Debtor in disadvantageous position than they would have been in the event of distribution of assets of Corporate Debtor being made in accordance with section 53 of the Code.



The applicant states that sub-section (1) of section 45 provides that if the Resolution Professional, on an examination of the transactions of the corporate debtor under section 43 (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, then the Resolution Professional shall make an application to the Tribunal to declare such transaction as void and reverse the effect of such transaction in accordance with the provisions of the code.

It is further contended that the said creation of interests by Directors of the Corporate Debtor on the immovable properties of the Corporate Debtor in favour of

the lenders of JAL, i.e. related company is a fraudulent and wrongful transaction within the meaning of section 66, and a preferential transaction and undervalued transactions within the meaning of section 43 and 45 respectively of the Code. The Promoters and Directors of the Corporate Debtor have connived and conspired to cause loss to the creditors of the Corporate Debtor.

Section 25 of the Code casts a duty upon the Resolution Professional to file avoidance application in accordance with chapter III of the Code. Section 66 of the Code casts a duty to apply to the Adjudicating Authority in case he finds a fraudulent and wrongful transaction has been made. Section 20(1) of the Code mandates and requires the Resolution Professional to make every endeavor to protect and preserve the value of the property of the Corporate Debtor. In the circumstances, the applicant has filed the present application seeking appropriate direction.



The holding company i.e. Jaiprakash Associates Ltd. (JAL) has filed its reply against the application submitted by the Resolution Professional. It is contended in the objection that Resolution Professional Mr Anuj Jain has no locus-standi to file the above application under various sections of IBC. Mr Anuj Jain is acting as Insolvency Resolution Professional only for the limited purpose as ordered by the Hon'ble Supreme Court vide order dated 11th September, 2017. He can perform only the limited functions for which the Hon'ble Supreme Court has appointed him. Mr Anuj Jain cannot claim to be holding the office of Resolution Professional under the IBC as it does not enjoy all such powers as are vested in the Resolution Professional under the Code. Given the above facts, the above application is without the authority of law and wholly without jurisdiction which deserves to be rejected outright.

It is contended in the objection of JAL that it cannot be disputed that so far the lenders of the Jaiprakash Associates Ltd. have not enforced the impugned

mortgages and no liability has fallen on the Corporate Debtor. No Resolution plan has been finalised, and no quantum of shortfall attributable to the impugned mortgages has been determined. Hence, the application is only academic, as no loss has been caused to the Corporate Debtor or to any class of creditors nor any financial measure which Corporate Debtor intended to take at any stage was hampered or obstructed by the impugned mortgages. The allegation in the above application is all hypothetical. Further, the contention of the applicant that the said land could have been sold or mortgaged for loans which could have been raised by JIL to meet its obligations towards Creditors, Homebuyers and FD holders is wrong and baseless.

The decision was taken by the Directors in good faith, in the facts and circumstances then prevailing or which could be reasonably anticipated and according to their wisdom. Such decisions cannot be questioned by the applicant by present circumstances without proving by cogent evidence that the decision of the directors was fraudulent. Even today, the corporate debtor has 741 acres of unencumbered land which could have been used, but not done, by the applicant for raising interim finance for the said purposes of the Corporate Debtor, which is part of the statutory duty.



It is pertinent to mention that these facts are already disclosed in various documents in public domain, including the Financial Results of the Corporate Debtor which were widely circulated and uploaded on the website, Prospectus issued in 2010 for the initial public offer, filing done with various Regulatory Authorities like the ROC with whom the Financial Statements, Charges for creation of Security and Offering Documents have been filed under Stock Exchanges and also the Information Memorandum issued by the applicant on 1st December, 2017. It is further contended by the JAL some isolated transaction does not amount to

fraudulent conduct of business of the corporate debtor. It is further contended by the JAL the section 43 and 45 of the IBC came into effect w.e.f. 15th December, 2016 and sections 66, 60, 25, 49, 50, 18, 25 and 69 came into effect w.e.f 1st December, 2016. The I & B Code is prospective legislation and various provisions of the code, especially the provisions of section 66, 43, 45, 60 (5) (a) and section 25 (2) (I), came into force only from the dates given above, and they do not have retrospective effect.

It is further contended by the JAL that to bring the impugned transactions within the ambit of Section 66 and other sections; the applicant had deliberately suppressed the background of the impugned mortgages referred to in para XXVI of the application, which if disclosed and considered, would have led to inevitable conclusion that the impugned transactions are beyond the limitation period and also that the transactions had materialized before the relevant provisions of the IBC came into force.



It is contended that on the request of JAL, the Corporate Debtor provided the alleged collateral security to the lenders in respect of loans granted by various banks/financial institutions to JAL. The impugned mortgages are in fact continuation of transactions approved and effected long back. These are not the transactions which have taken place for the 1st time on the dates mentioned in the above application. The applicant has deliberately misrepresented the fact and avoided to give complete details with malafide intention to bring the impugned transactions within the limitation period. The impugned transactions were approved by concern Committees/Board of Directors and were disclosed by the Corporate Debtor on various dates. The securities provided/mortgage created were disclosed in the financial statement of the Corporate Debtor in respective financial years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17. The fact of a

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mortgage created by the Corporate Debtor in favour of the lenders of JAL was also disclosed in the Red Herring Prospectus issued in 2009-10 at the time of Initial Public Offer made by the Corporate Debtor.

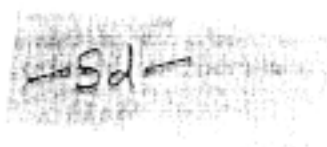
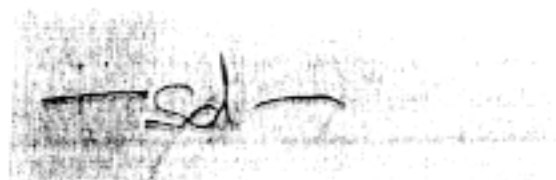
The answering respondent has contended that the Corporate Debtor was incorporated on 5th April 2007 as a public limited company in the State of the U.P. The main object of the Corporate Debtor is to develop infrastructure facility, the 165 km Six Lane Assess Controlled Expressway between Noida and Agra. The Corporate Debtor is a subsidiary of Jaiprakash associates Ltd (JAL) which held 71.64% of its equity share capital as on 31 March 2017. The shares of the corporate debtor are listed on BSE & NSE. It has about 1,29,000 shareholders. The paid-up value of the shares held by Jaiprakash Associates Ltd is ₹995 crores as on 31st March, 2017, which amounts to direct contribution by Jaiprakash Associates Ltd to the capital of the Corporate Debtor. On the advice of Yamuna Expressway Industrial Development Authority (YEIDA), JAL agreed to incorporate an SPV for implementation of the project. Accordingly, Jaypee Infratech Ltd (Corporate Debtor) was incorporated as an SPV on 5th April 2007. The contract was awarded to the answering respondent and accordingly the answering respondent was appointed as the "Concessionaire". The answering Respondent transferred all its valuable rights and benefits and obligations under the Concession Agreement vide Assignment Agreement dated 19th October 2007 followed by Project Transfer Agreement dated 22nd October 2007 to the SPV. The entire project cost of ₹13,486 crores was made through a mix of debt of ₹6550 crores and equity (including internal accruals from Real Estate Development) of ₹6936 crores as on 31st March 2017. The project of the Yamuna Expressway has made a significant contribution to the ongoing development in the region.



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The Wish Town project which is being developed on the land parcel LP-1 at Noida, comprised of 28,150 built-up residential units having a sales value of ₹15,758 crores of which 12,123 crores has already been received on 31st March 2017. So far the corporate debtor has offered possession of 4820 units without any need arising for raising funds by the sale of impugned mortgaged land. The operations of the Corporate Debtor are being financed by a consortium of 12 banks/FI which are IDBI Bank, State Bank of Hyderabad, LIC, Union Bank of India, Corporation Bank, J & K Bank, State Bank of Patiala, Bank of Maharashtra, India Infrastructure Finance Company, ICICI Bank, IFCI Ltd. and Syndicate Bank. It is important to point out that several of these Banks/FI are also lenders to Jaiprakash Associates Ltd.

The answering respondent contends that the operating performance and financial position of the corporate debtor had been quite good up to the financial year 2014-15. The company had been meeting all its liabilities towards the lenders and the depositors and other creditors, and there was no default in repayment of the dues of above parties. Only during financial year 2015-16 onwards, the performance of the corporate debtor took a setback due to various reasons, beyond the control of management, such as general economic slowdown, subdued market and low sales volume in real estate market, National Green Tribunal stalemate, delay in completion of semifinished inventory leading to declining construction linked real estate collection, though the assets base remain considerably higher than the liabilities. In spite of the decline in performance, the corporate debtor has been making a sincere effort to pay the interest dues of lenders to the extent possible. The corporate debtor had moved an application under section 74 (2) of the Companies Act 2013 before this Tribunal for extension of time of repayment of deposits.

It is further contended that against the outstanding liability of ₹12,902.49 crores the Corporate Debtor has a very large asset base. The result is that in spite of the liquidity problems the asset base continues to be high-and solid. The fair market value of the assets owned by the corporate debtor has been substantially higher than the outstanding liabilities. The fair market value of the land mortgaged to the lenders alone aggregate ₹17,116 crores as per the last valuation done on 30th June 2016 through G.A. Advisory Private Limited, the IDBI Bank empanelled valuers. The fair market value of all the assets of the corporate debtor as on 31st March 2017 is shown as ₹32,882.03 crores by the answering respondent in a table. The answering respondent has mentioned that land (comprising 1738 acres of land mortgaged to IDBI led consortium and 590 acres of unencumbered land with the company is valued as ₹20,111 crores on most conservative basis taken by IDBI itself in its application.

The answering respondent has further contended that the financial position of the corporate debtor was very strong notwithstanding the temporary financial crunch. The fair market value of the assets was as high as ₹32,880 crores against the total outstanding liability of ₹12,902 crores only. The debt to equity ratio was also very comfortable. As on 31st March, 2015, it was 1.34, on 31st March, 2016 it was 1.50 and on 31st March, 2017 it was 1.57. For infrastructure companies the debt: equity ratio can be more than 2.00.

The answering respondent has further contended that with a view to overcoming the liquidity problems of the Corporate Debtor a **Joint Lenders Forum** was constituted in the year 2015, which held a number of meetings and the senior executives of the corporate debtor and the lenders have been making hectic efforts since 2015 to work out viable restructuring plan for the corporate debtor. The JLF



was constituted as per RBI circular dated 26th February 2014 read with circular dated 5th May 2017, which had a statutory flavor. The corporate debtor was seeking induction of new lenders/investors to meet the fund requirements for completion of pending flats in Wish Town to ensure the completion and delivery of flats to homebuyers at the earliest. The revival plan of the corporate debtor was under active consideration of the lenders. The answering respondent contends that JAL as holding company has made substantial sacrifices in favour of the Corporate Debtor, as its subsidiary, and has been rendering all kind of assistance both managerial and financial.

The answering respondents further contend that the revival plan of the corporate debtor was under active consideration of the lenders, when the IDBI Bank received direction dated 15th June, 2017 from the Reserve Bank of India for initiation of insolvency regulation process under the provisions of Insolvency and Bankruptcy Code 2016.



The financial position of the corporate debtor has been very sound. The fair value of its assets has been substantially higher than the outstanding liabilities. Its debt to equity ratio was very comfortable. The corporate debtor has large land bank and hence the lenders, most of the lenders being common, never objected to including mortgages of land in favour of JAL keeping in view the totality of circumstances and the special relationship between the corporate debtor and JAL. The Jaiprakash Associates Ltd. has been helping Jaypee Infratech Ltd. in various ways, and hence the creation of impugned mortgages was not unusual but merely reciprocal. Such reciprocal accommodation cannot be termed without consideration. It is general banking practice to ask for additional security from the third party for the financial assistance provided by the lenders to the borrower.

The applicant is questioning the business decision taken by the Directors of the Corporate Debtor which were taken at the relevant time keeping in view the facts and circumstances then prevailing and in good faith and after due diligence. The applicant has no legal right to question the economic wisdom of the directors of The Corporate Debtor and the lenders and has no legal right to say that they ought to have acted only in a particular manner. The Board of Directors who took the decision were not lower level executives having limited knowledge but comprised of senior officers of the Lenders as their Nominee Directors, and also Independent Directors appointed as per prevailing legal requirement and had considerable experience and expertise in the field of finance and business management.

The answering respondent further contended that the jurisdictional condition for invoking section 66 is that the business of the Corporate Debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose.



In the present case, the Corporate Debtor has been carrying on the business of Infrastructure Development. Regarding schedule VI to the Companies Act 2013, the Corporate Debtors is an infrastructure company, and regarding section 186 (11), the restrictive provisions contained in that section are not applicable to the Corporate Debtor. There is not even a whisper in the above application that this business has been carried on with intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose. The allegation is that the corporate debtor created mortgage of its land in favour of lenders of the answering respondent to secure the loan given by such lenders to the answering respondent. No transaction which is permitted under the law which has been done by the legal provisions, that too, transparently, could amount to carrying on business for a fraudulent purpose. Keeping in view the totality

of facts and circumstances explained above, solitary acts of creating impugned mortgages to secure the loan of its holding company which has provided huge funds/support to the corporate debtor and has been helping it in times of need, can by no stretch of imagination be regarded as conduct of business to defraud the creditors or for any fraudulent purpose but the corporate debtor. Hence, once the above jurisdictional condition itself is not satisfied, the subsequent provisions of this section will not be attracted.

The mortgages were in effect measure to give comfort to the lenders in line with the normal banking/business practice in the circumstances then prevailing or which could be reasonably anticipated, and there was no risk of lenders getting any opportunity to enforce the mortgage.



The Corporate Debtor is a public limited company, and its shares are listed on NSE and BSE. The affairs of the Company are subject to the scrutiny of SEBI and other Regulatory Authorities. The Corporate Debtor has a professional team of Directors including nominee Directors and independent Directors. These Directors have been attending the meeting of the board, the minutes of the board meeting is confirmed at the next board meeting. None of these directors ever recorded any note of dissent to the impugned transactions in any meeting is otherwise as they were fully aware that the transactions were in normal course of business and there was nothing wrong in it. If the allegations of the applicant are believed to be true, it will imply that all the Directors including the nominee Directors and independent Directors, had acted in collusion, which would be for fetched and patently unreliable and cannot be given any credence.

The answering respondent has questioned the applicability of section 43 of IB code. It is contended that section 43 will apply only if it is shown that the corporate

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debtor has at the relevant time given preference in such transactions and such manner as laid down in sub-section (2), to any persons as referred to in sub-section (4), as provided in sub-section (2) a corporate debtor shall be deemed to have given preference only to cases where there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and such transfer had the effect of putting such creditor or a surety or a guarantor in a beneficial position than to have been in the event of distribution of assets being made in accordance with section 53.



The answering respondent contends that none of the ingredients of section 43 (2) is satisfied in respect of impugned transactions. In the instant case, the impugned mortgages have been created by the Corporate Debtor on account of financial debts extended by mortgagee/Banker to JAL and not to the Corporate Debtor. The impugned mortgages have not been created on account of any antecedent debt liability owed by the Corporate Debtor. Hence, the question of putting the mortgagees in a beneficial position viz-a-viz other creditors of the corporate debtor in the event of a distribution of assets being made by section 53 does not arise.

Sub-section 3 of Section 43 of I & B Code excludes transfer made in the ordinary course of business or financial affairs of the Corporate Debtor or the transferee. The word "or" used in the sub-section makes it clear that each instance of exclusion is independent. In the instant case, the impugned mortgage was created in the ordinary course of business or financial affairs of the corporate debtor. However, in any case, it cannot be disputed that such mortgages were created in the ordinary course of business or financial affairs of the transferees/lenders.

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The impugned transactions are between the corporate debtor the mortgagee/lenders. They are not related parties. Hence the limitation period of only one year laid down in section 43 (4) will apply and not two years. In the present case, the impugned mortgages were created more than one year before insolvency commencement date.

It is further contended by the answering respondent that the provisions of section 45(2)(b) of IBC are not at all applicable in the present case. It is noteworthy that section 42(2)(b) is relevant only when the transaction is covered by section 43(2). The impugned transactions are not a preferential transaction and not covered by section 43(2). Hence section 45 does not apply to the impugned transactions.



It is further submitted by answering respondent that the impugned transactions cannot be regarded undervalued transactions given the fact that Jaiprakash Associates Ltd has been helping Jaypee Infratech Ltd in various ways, hence the creation of impugned mortgages were not unusual but merely reciprocal. Such reciprocal accommodation cannot be termed "without consideration". The companies act 2013 does not prohibit the creation of security interest by a company for securing the debt extended to other companies including a holding company for which adequate disclosures were made, and, therefore impugned transactions/mortgages do not violate any applicable laws.

Answering respondent has also questioned the applicability of section 60(5)(a) of I & B Code. It is contended that clause (a) of sub-section (5) of section 60 provides that NCLT shall have jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person. There is no dispute as to the jurisdiction of this tribunal, but in the present case, the

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question of invoking the jurisdiction of this Tribunal does not arise as the relevant provisions referred to above are not applicable.

ICICI Bank has also filed its objection against the application filed by Resolution Professional. It is stated in the objection that ICICI Bank is a secure financial creditor of the Corporate Debtor. It is submitted that ICICI Bank has filed its claim against the corporate debtor before the Resolution Professional for a total amount of ₹304,10,12,486.52 as on 9th August 2017 about the financial assistance granted to the Corporate Debtor. It is further contended that the ICICI bank is also a member of the Consortium of lenders (JAL lenders) that sanctioned the credit facilities to the holding company of the Corporate Debtor, viz, Jaiprakash Associates Ltd ("JAL").



It is further contended that corporate debtor has mortgaged certain of its immovable properties, referred in part XXVI of the application under reply, to secure the aforementioned Rupee Term Loan Facility granted to JAL by the answering respondent. The answering respondent has filed its claim against the corporate debtor as a security provider for JAL's facilities in separate Form-C. It is further submitted that Rupee Term Facility of 15 billion granted by the ICICI bank to JAL was exclusively secured by the 1st Exclusive Charge over immovable property comprising of hundred acres of land at Tappal, created by registered Mortgage dated 10th March 2014.

The ICICI is a Bank which has acquired the mortgagee rights upon the mortgage properties in a legal and bona fide manner in the ordinary course of business or financial affairs of the corporate debtor. It is further submitted that under the Consortium mortgages and Exclusive Mortgage, the answering respondent is the beneficiary of the interests. The answering respondent is a bank duly authorised by

the RBI amongst other things, to carry out the business of commercial lending on a secured basis. It is customary for the answering respondents and other banks to seek credit enhancement on account of outstanding debts by way of creation of security interests by borrowers and their group companies.

The answering respondent is a lender to JAL and, after careful financial and commercial diligence of the creditworthiness of JAL, the answering respondent had sought the creation of further security interest from JAL. The JAL subsequently requested the corporate debtor to create mortgages over the mortgaged properties as security for the JAL Facilities. It is submitted that since the transfer envisaged under the Consortium Mortgages and the Exclusive Mortgages are for the benefit of the answering respondent in the ordinary course of the answering respondent's business or financial affairs. Thus the creation of mortgage over the mortgaged properties cannot be and ought not to be considered as preferential transactions, as falsely and wrongly alleged by the Resolution Professional in the application.



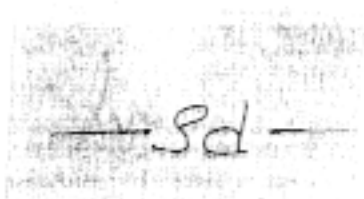
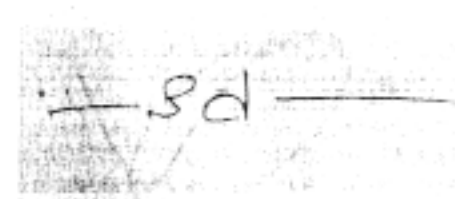
It is further submitted that the Resolution Professional has instead of placing complete facts, has selectively relied on the documents received by him to fit his case, to mislead and defraud this Tribunal. It is further submitted that the Resolution Professional has impliedly incriminated the answering respondent in its allegations of fraud which are not supported by any cogent reasons or documentary evidence whatsoever. The mere reckless allegation of fraud is irresponsible. Any such allegation is to be supported by cogent evidence to set-aside the impugned transactions. The impugned transactions equally do not fall under the avoidance rules concerning undervalue transactions. A transaction is required to be subjected to scrutiny under section 45 of the code to determine whether such transaction has been undervalued only if such transaction is a preferential transaction that falls

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within section 43(2) of the Code and not otherwise. The answering respondent contends that impugned transactions are not preferential transactions.

In the instant case, the corporate debtor has created a security interest in favour of the JAL lenders including the answering respondent herein for adequate consideration of the grant of loans to JAL, its holding company. It is also relevant to mention here that not only JAL, the Corporate Debtor's holding company is closely associated with the construction project at the Noida Expressway and residential development, as JAL was the initial allottee of the said project and the corporate debtor has been implementing the same as its Special Purpose Vehicle. The corporate debtor is engaged in the business of buying and selling/dealing properties and selling, buying and creation of mortgage are in the ordinary course of business of the corporate debtor. Therefore, it is evident that the creation of mortgage interest by the corporate debtor in favour of JAL lenders has been given adequate consideration and certainly cannot be impugned as undervalue transactions. It is trite that the provision of security by a subsidiary for the debts of its parents confers tangible and adequate commercial benefit on the subsidiary. It is further submitted that the aforesaid third-party mortgages were created by the corporate debtor for the benefit of the JAL lenders, including the answering respondent herein, to secure the loans that were granted to JAL by the JAL lenders. Third-party mortgages are accepted commercial practice among the lending company in India and globally. It is thus clear that at the time impugned transactions were entered into, the consideration received by the Corporate Debtor for creating the Consortium Mortgages as well as the Exclusive mortgages, was commensurate with the value of the consideration provided by it.

The respondent further contends that impugned transactions do not amount to fraudulent transactions under section 66 of the Code. Section 66(1) of the Code would be applicable only when this Tribunal finds a specific intent on the part of the Corporate Debtor to defraud its creditors. The Resolution Professional has miserably failed to bring any fact, correspondence, documents or other evidence on record which leads to the conclusion that business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose or that the corporate debtor entered into the impugned transactions with such specific fraudulent intent. On the contrary, third-party credit enhancement by group companies is a globally recognized principle which is also well established practice in India. The answering respondent entered into the impugned transactions with clean hands, valuable consideration and bona fide intent with the belief that the corporate debtor created the Consortium mortgages as well as the Exclusive mortgages for purely commercial purposes without any intent to defraud creditors. The merits of the impugned transactions were duly approved under the requested

corporate authorizations, by applicable law.



The burden of proof is on the applicant to prove that there was subjective intent to defraud the creditors by keeping the property out of the reach of the creditors. The impugned transactions have been carried out in the ordinary course of business of the applicant for the valuable and commercially valid consideration. Hence the impugned transactions cannot be termed a transaction intended to defraud the creditors of the corporate debtor. It is further submitted by the answering respondent that the Resolution professional has failed to appreciate that the necessary filing/registration undertaken by the corporate debtor with the registrar of companies, CERSA I. The public record was available to everyone including the lenders of the corporate debtor. It is further submitted that despite the knowledge of

the Consortium Mortgages and Exclusive Mortgages being in public records and the annual report of JAL, none of the lenders of the corporate debtor, whether at any of the joint lenders meetings are otherwise, have raised any objection to the creation of the Consortium mortgages and the exclusive mortgages by the corporate debtor. It is further submitted that neither any shareholder nominee director of the corporate debtor has raised any objections to the creation of Consortium mortgages and the Exclusive mortgages by the corporate debtor.

The Resolution Professional has filed a reply to the objections of ICICI bank and objections of the JAL wherein the contention raised in company application is reiterated.



We have heard the arguments of the Ld. counsels representing the RP, Ld. counsel appearing on behalf of JAL and the counsels representing the lender ICICI Bank and Standard Chartered bank and perused the record.

Following issues arises for our consideration:

1. **Whether Interim Resolution Professional has authority to file this application?**
2. **Whether impugned transactions have been carried out with intent to defraud creditors of the corporate debtor or for any fraudulent purpose and is covered under sec 66 of the Code?**
3. **Whether impugned transactions are preferential transactions covered u/s 43(2)(a) of the code or undervalued transaction covered under sec 45 of the Insolvency in Bankruptcy Code 2016?**
4. **Whether look-back period available for the impugned transactions as per provision of sec 46(1)(i) is one year or two years?**

ISSUE NO.1

The respondent no.15 i.e. Jaiprakash Associates Ltd. has objected that the applicant has no locus standi to file this company application No.26 of 2018. The

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contention of the respondent number 15 is misconceived and contrary to the provisions of insolvency in bankruptcy code 2016.

In this regard, it is to be clarified that Hon'ble Supreme Court in writ petition No. 744 of 2017, vide order dated 4th September 2017 stayed the operations of the order dated 9th August 2017 passed by this Tribunal. This order was further modified by Hon'ble Supreme Court vide order dated 11th September 2017 whereby it was directed to the IRP to formulate and submit an interim resolution plan to the Supreme Court.

Hon'ble Supreme Court vide its order dated 21st March 2018 has directed the applicant to proceed with finalising the Resolution Plan. Therefore, the applicant has been taking necessary steps required for finalizing the Resolution Plan.



The above order was in the modification of the earlier order dated 4th September 2017. In the light of order of the Hon'ble Supreme Court dated 11th September, 2017 it is clear that the stay order granted by Hon'ble Supreme Court on 4th September, 2017 has been vacated.

In the writ petition mentioned above, Hon'ble Supreme Court by order dated 21st March, 2018 has further issue direction to IRP "to proceed and finalize the Resolution Plan, but the same shall be implemented after taking leave of this Court."

Given the above, the applicant has been conducting the corporate insolvency resolution process of the corporate debtor. The Resolution Professional submitted that by Regulation 39(2) of the Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process of Corporate Persons) Regulation 2016, he is required to submit to the committee of creditors all details of the transactions, if any, which falls under section 43, 45, 50 and 66 of The Code. Before discussing the issue, the relevant provisions of the Code are reproduced herein below:

25. Duties of resolution professional— (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(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;
- b. represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- c. raise interim finances subject to the approval of the committee of creditors under Section 28;
- d. appoint accountants, legal or other professionals in the manner as specified by Board;
- e. maintain an updated list of claims;
- f. convene and attend all meetings of the committee of creditors;
- g. prepare the information memorandum in accordance with Section 29;
- h. invite prospective lenders, investors, and any other persons to put forward resolution plans;
- i. present all resolution plans at the meetings of the committee of creditors;
- j. file application for avoidance of transactions in accordance with Chapter III, if any; and
- k. such other actions as may be specified by the Board.



This sub-section (1) of sec 25, casts a duty upon the Resolution Professional to preserve and protect the assets of the Corporate Debtor, including The continued business operations of the Corporate Debtor. For this purpose, clause (J) of sub-section (2) of sec 25 casts a duty upon the resolution professional to apply for the avoidance of any such transaction before the Adjudicating Authority by chapter III of the code. Thus, in view of the provisions of the Code and the orders passed by the Hon'ble Supreme Court, the applicant has a duty to file an application for avoidance of any such transaction before the Adjudicating Authority in accordance with

chapter III of the code and therefore, contention of the applicant that the RP has no locus standi to file the present application, is without any basis.

Therefore, contentions raised by the respondent number 15 that the applicant does not have jurisdiction to act as Resolution Professional deserves to be rejected. Thus the issue number 1 is decided in negative in favour of the applicant Resolution Professional.

ISSUE NUMBER 2, 3 & 4 (taken together for convenience).

The JAL contention that the application is only academic & hypothetical so far as its lenders have not enforced the impugned mortgages and no liability has fallen on the Corporate Debtor is completely devoid of merits and untenable in law. The applicant Resolution Professional has filed this application seeking avoidance of the transaction by which mortgages have been created in favour of the lenders of the Jaiprakash Associates Ltd. regarding the unencumbered 858 acres of land of the Corporate Debtor, at a time when the corporate debtor's account was declared NPA by some of its lenders and rather using the said land to raise funds to make its account standard, the Promoters and Directors of the Corporate Debtor created mortgages in favour of the lenders of JAL.



It is obvious that the Corporate Debtor was in dire needs of funds during the period and was facing severe liquidity crunch to complete the construction of the projects and deliver the flats to the homebuyers, as well as on a payment obligation to finalize the dues of creditors including to the fixed deposit holders. The corporate debtor owns various pieces of unencumbered land which was/is available to be liquidated or offered as security to raise finance to complete the construction of the flats and deliver possession of the flats to the homebuyers.

The contention of the JAL that the decision taken by the Directors of the corporate debtor was in good faith and transactions could not be questioned by the

applicant in view of the present circumstances is untenable in law. It is pertinent to mention that when the account of the corporate debtor was declared as NPA, the Directors of The Corporate Debtor, in utter disregard to their fiduciary duties and duty of care to the creditors of the corporate debtor, mortgaged 858 acres of unencumbered land owned by The Corporate Debtor to secure the debt of the related party i.e. Jaiprakash Associates Ltd. The value of the land mortgaged by the corporate debtor was estimated to be in the range of 5000 to 6000 crores approximately, as per the valuation report prepared at the time of mortgage of the said land. The mortgage of land was created without any counter guarantee from a related party. The mortgage of land is in nature of asset stripping and entered into with the Intent to defraud the Creditors of the Corporate Debtor.



The Jaiprakash Associates Ltd has failed to explain as to the circumstances under which the promoters and Directors have decided to mortgage the lands of the corporate debtor to the lenders of JAL and why no consideration thereof has been paid to the Corporate Debtor and that too without any counter guarantee from JAL. This clearly shows that the said transaction has been entered to defraud the Lenders of the Corporate Debtor. It is important to point out that Resolution Professional has pointed out that he could not find any approval obtained from the lenders of the corporate debtor for the impugned mortgages. It is pertinent to note that at the time when the mortgage was created, Corporate Debtor was already in default to its lenders and it is unlikely that the lenders of The Corporate Debtor would have provided no objection to creation of mortgage to secure debt of related party as that would have compromised recovery of not only their dues but also the interest of thousands of homebuyers waiting for their flats in which their hard earned money has been invested.

The applicant resolution Professional contends that while performing his duties under the Code, the applicant discovered that, right in the middle of its immense financial crunch, and while continuing to default to homebuyers and financial creditors, and even after it had been declared as NPA, the Directors of the Corporate Debtor, in utter disregard to fiduciary duties and duty of care to the creditors of the Corporate Debtor, Mortgaged 858 acres of unencumbered land owned by the Corporate Debtor to secure the debt of the related party i.e. Jaiprakash Associates Ltd (hereinafter, "JAL"). The value of the Land Mortgaged by the Corporate Debtor was estimated to be in the range of ₹5000 to 6000 crores approximately, as per the valuation report prepared at the time of mortgage of the said land. The mortgage of land was created without any counter guarantee from a related party.



That on examination of records of the Corporate Debtor accessible to the applicant, the applicant could not find any approvals obtained from the Lenders of the Corporate Debtor to mortgage its immovable properties as detailed above in favour of lenders of a related party, i.e. JAL. While nominees for lender attended the Board Meeting of the Corporate Debtor in which the decision to mortgage the land was taken, that cannot be treated as approval/no objection of lenders as lenders invariably have covenants in loan agreement that require their approval to be obtained for creating interest in favour of any one of the unencumbered assets of the borrower. Further, on examination of the records, the applicant has also reason to believe that no shareholders' approval was obtained to mortgage the land of the corporate debtor in favour of the lenders of JAL. It is pertinent to note that when the Mortgage was created, the corporate debtor was already in default to its lenders and it is unlikely that the Lenders of Corporate Debtor would have provided no objection to creation of mortgage to secure debt of related party as that would have

compromised recovery of not only their dues but also the interest of thousands of homebuyers waiting for their flats in which their hard earned monies have been invested. The same for fixed deposit holders.

The applicant contends that the said Transactions of Creation of Mortgage of 858 acres of land to secure the debt of related party is clearly a fraudulent and wrongful transaction under section 66 of the Code as it has been carried on with the intent to defraud the creditors of the Corporate Debtor.

The Corporate Debtor has approximately 30,000 flats under construction and once the promoters and directors of the Corporate Debtor were aware of the financial stress since 30th September, 2015, and to undertake such transaction to create an



interest in its immovable property for financial assistance to its related party has been entered to defraud the Creditors of the Corporate Debtor and the homebuyers

at large. It had also defaulted in payment of loans and other financial assistance borrowed from financial creditors, including fixed Deposit Holders. The mortgage was created in complete disregard to the interests of the Creditors and Stakeholders of the Corporate Debtor and the homebuyers at large. It has defaulted in payment of loans, and other financial assistance borrowed from financial creditors, including fixed deposit holders. Its account was declared as a non-performing account (from now on "NPA") on 30th September 2015 by LIC and on 31st March 2016 by other lenders. The Corporate Debtor was in dire needs of funds during this period and was facing severe liquidity crunch to complete the construction of projects and deliver the flats to homebuyers, as well as honour the payment obligation to financial creditors including the fixed deposit holders. Since the Corporate Debtor itself was in dire need of funds and could have sold/mortgaged unencumbered land to raise funds to complete construction of flats in a timely manner and to fulfil its obligation

to its creditors and prevent value deterioration erosion or insolvency is highly questionable. But, it chose to give away the land to secure the debt for a related party. The mortgage was created in complete disregard to the interest of the creditors and stakeholders of the Corporate Debtor. Now JAL has defaulted to its lenders exposing the mortgaged land to the risk of being sold to recover the dues payable by JAL.

The sub-section (1) of Section 66 of the Code provides that if during the CIRP, it is found that any business of the corporate debtor has been carried on with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Tribunal may on application of the Resolution Professional pass an order directing any persons who were knowingly parties to carry on the business in such manner shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit.



It is submitted by the learned counsel that section 43(1) makes it clear that before making an application under this section, the RP has to form an opinion that corporate debtor has at relevant time given preference in such transactions and in such manner as laid down in sub-section (2) to any person as referred in sub-section (4). The learned counsel representing the JAL submitted that from the averments made by the resolution Professional in para XXIX of the application it is clear that he has not examined the explanation given by the lenders and has not formed an opinion as to whether the provision of IBC is applicable or not and has mechanically proceeded to file the instant application. There is no formation of opinion as to the applicability of provisions of IBC to the impugned transactions.

Since it is a condition precedent to applying, this is a jurisdictional condition, and if this condition is not satisfied, the application would be liable to be rejected outright without going into the merits of the case. It is contended that in the present

case, the above jurisdictional condition is not satisfied in as much no “opinion” in the eyes of the law can be said to have been formed by Resolution Professional before applying in view of the following –

- (i) “Opinion” has a special meaning in law. ‘Opinion’ must be formed after considering the relevant facts and legal provisions. ‘OPINION’ is not a synonym of impression, hearsay, or gossip. An opinion formed without considering the relevant material and without application of mind is not opinion and proceedings founded on such illegal formation of opinion are void, being without jurisdiction. The Ld. counsel has relied on case law 2006 (281) ITR 147 (All) – at page 154-155 Raghuram Graph P Ltd.V.ITO wherein it is held that opinion means something more than mere “retailing” of “gossip” or hearsay, it means judgement or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. It has placed reliance upon the judgement of the Hon’ble Supreme Court in the case of Dolgovinda Paricha v/s Nimai Charan Misra AIR 1959 SC 914.
- (ii) In the present case, although RP in Para XIII /page 7 of the Application has made an averment that he has examined the records, it is nothing but a mechanical reproduction of the language of section 43(1). The following facts show that he has moved the application without application of mind to the relevant material and the provisions of the law –



- **In Para XXIX/page 15-** it is stated that RP sent a letter dated 05.12.2017 to all lenders of JAL to seek their explanation concerning proposed avoidance of impugned mortgages, but they denied that various sections referred to in the letter were applicable. In their replies sent by lenders to RP, all lenders have explained in detail the reasons that the impugned transactions are not covered by sections 43, 45 etc. From the averments made by RP in **Para XXIX** of the Application, it is clear that he has not examined the explanation given by the lenders and formed an opinion as to whether the provisions of IBC are applicable or not and has mechanically proceeded to file the instant application. There is no formation of opinion as to the applicability of the provisions of IBC to the impugned transactions.
- **In Para XXXII/page 15** RP has stated that a letter dated 05.12.2017 was sent to JAL to seek their explanation, but JAL failed to provide any explanation. This averment again shows that RP has not even examined his own letter and the reply received from JAL. The letter sent by RP did not seek any explanation but only sought some documents and information which **were supplied** by JAL.

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We are not satisfied with the with the argument advanced by the learned counsel for the answering respondents. The statutory requirement under sub-section (1) of section 43 of IBC requires that RP has to form an opinion and this opinion can only be formed by perusing the records available with him. Under the Code, the Resolution Professional is not required to give a judgement for initiating action under section 43. In case, if the resolution Professional has formed an opinion that the corporate debtor has at the relevant time given a preference in such transactions and such manner as laid down in sub-section (2) to any persons as referred in sub-section (4) then he shall apply to the Adjudicating Authority for avoidance of preferential transactions referred to in section 44 of the code. Thus statutory requirement to take the decision is on the Adjudicating Authority not on the Resolution Professional. The opinion formed by the Resolution Professional can be based on the records available with him. By the averment of the answering respondent, it is clear that the resolution professional has sought an explanation from the concerned persons and after that, he has formed the opinion.



The learned counsel for the answering respondents contends that for initiating action under Section 43, the following ingredients have to be satisfied –

- i. it is to be shown that Corporate Debtor has at a relevant time given preference in such transactions and such manner as laid down in Section 43 of sub-section (2) to any persons as referred to in sub-section (4).
- ii. as provided in sub-section (2), a Corporate Debtor can be said to have given preference only in cases where there is a transfer of property or an interest thereof of the Corporate Debtor -,
 - for the benefit of a creditor or a surety or a guarantor
 - for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
 - such transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made under Section 53.

iii. Above ingredients of section 43(2) are not satisfied in the present case in as much as –

- Impugned mortgages have been created by Corporate Debtor on account of financial debts extended by mortgagee/ bankers to Jaiprakash Associates Limited and not to the Corporate Debtor;
- mortgages are not created on account of any antecedent debt or liability owed by the Corporate Debtor;
- hence, the question of putting the mortgagees in a beneficial position viz-à-viz other creditors of the Corporate Debtor in the event of a distribution of assets does not arise.
- even otherwise, as clearly mentioned in the NCLT Order dated 09.08.2017 [at page 28 of Application] *“it was an undisputed position in the present matter that the Financial Creditor along with other lenders and the Corporate Debtor company are having a consensus for early approval of resolution plan”*, which shows that even financial creditors upto the stage of admission of CP 77/17 did not contemplate that the contingency of distribution of assets will arise as required under section 53 of IBC.



Sub-section (3) of Section 43 excludes transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee. The word “or” used in this sub-section is important. In the present case, the impugned mortgages were created –

- In the ordinary course of financial affairs of Corporate Debtor which is evident from the fact that the practice of creating such mortgages have been in vogue since 2009;
- and in any case, the transactions were undisputedly in the ordinary course of business or financial affairs of the lenders, which fact has been asserted by lenders in their replies and has not been disputed by the Applicant in the above Application.
- hence, the impugned transactions are excluded under sub-section (3) and accordingly, section 43(1) is not applicable.

v. Relevant time - Limitation - u/s 43(4) – since impugned transactions are between Corporate Debtor and lenders, which are undisputedly not related parties, the applicable relevant time is only one year and not two years. The impugned transactions pertain to period beyond one year. Hence relief claimed is time-barred.

Sec 43 of the Insolvency in Bankruptcy Code, 2016 is reproduced hereunder for ready reference;



43. Preferential transactions and relevant time—

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in Section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers—

- (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—
 - (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and
 - (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation — For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—



- (a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or
- (b) preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

The answering respondent argued^{ed} that on a bare reading of the above provision, it is clear that the deeming provision of preferential transactions as provided in Section 43(2) applies only when the transfer of property or interest thereof, of the corporate debtor, is for the benefit of creditor or surety or a guarantor. In this case, lender i.e. the transferee is not covered under the definition of creditor or surety or a guarantor. Therefore, deeming provision of preferential transactions will not be applicable in this case.

Admittedly, in this case, the corporate debtor has mortgaged its unencumbered 858 acres of land in favour of lenders of Jaiprakash Associates Ltd. (JAL) to secure the debt granted to JAL and Resolution Professional has applied for the avoidance of said transactions.

That Senior Counsel appearing on behalf of the Resolution Professional has emphasized on the averments made by the respondent no.15, i.e. JAL in its reply at page no.2659. The applicant has filed the chart relating to the operational creditor's claim, which contains the name of Jaiprakash Associates Ltd. at a serial no. 3, and a claim of Rs.261.77 crore as operational creditor's claim in the name of JAL. In the remark column, it is stated that "INR 212 crore is a claim against the invocation of corporate guarantee which is considered as equity contribution and remaining INR 49 crore is to be adjusted against advance to JAL." Moreover, JAL is the principle contractor of Corporate Debtor.

Relying on the admission of Jaiprakash Associates Ltd, the holding company of Jaypee Infratech Ltd (JIL) there remains no doubt that the Jaiprakash Associates Ltd is one of the creditors of the corporate debtor Jaypee Infratech Ltd.

By averments in the reply the answering respondent JAL has admitted that it has made substantial sacrifices in favour of the corporate debtor, as its subsidiary, and has been rendering all kinds of assistance both managerial and financial. Therefore, the answering respondent's JAL has admitted that the JAL is also an operational creditor of its subsidiary JIL. Thus, the deeming provision of preferential transactions as provided in section 43 (2) applies for the transactions, i.e. mortgages executed by the corporate debtor thereby creating a security interest in favour of the lenders of Jaiprakash Associates Ltd (JAL), who is a creditor of JIL and is put in a beneficial position, then it would have been in the event of distribution of assets made in accordance with Section 53.

In the context of preferential transfers- section 3(34) of IBC, it may be noted that "transfer" is an omnibus expression encompassing "sale, purchase, exchange, mortgage, pledge, gift, loan, or any other form of transfer of right, title, possession or lien" Therefore, a transfer may be in the form of creation of security interest on the assets of the corporate debtor, and thus, creation of security interest or collateral may get categorized into 'preferential transaction', where all other conditions are satisfied.



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Preferential transactions and the relevant time as enshrined in Section 43 of IBC are as under:

43. Preferential transactions and relevant time —

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in Section 44.

The statutory provision itself provides following four ingredients of section 43 (1):

1. When Resolution Professional has formed an opinion that the corporate debtor
2. has at the relevant time
3. given a preference
4. in such transactions and in such manner as laid down in sub-section (2).

Further, Section 43(4) provides that;

Preference shall be deemed to be given at a relevant time, if—

- (a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

Before discussing the issue of the relevant time, definition of related party needs to be brought out.

Sec 5(24) of I & B Code provides that;

“related party”, in relation to a corporate debtor, means—

- (i) *a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;*

On a bare reading of the above provision, it is clear that subsidiary and its holding company is defined as the related party given the provision of section 5(24) of Insolvency and Bankruptcy Code. Admittedly corporate debtor Jaypee Infratech Ltd (JIL) is a subsidiary of Jaiprakash Associates Ltd (JAL).

It is clear that for transactions of a related party look back period is two years preceding the insolvency commencement date. Admittedly, in this case, the



insolvency commencement date is 9th August, 2017. Therefore the two years look-back period as provided in the code commences from 10th August, 2015.

The learned counsel for the answering respondents emphasized that I & B Code is prospective legislation and various provisions of the Code, IBC and sections 43, 45, 60(5)(a), 66 and 25(2)(i), came into force on or after 01.12.2016 and are not made applicable retrospectively. The transactions which are being questioned in the above Application were undertaken before 01.12.2016, the IBC and the above provisions do not apply to the impugned transactions. The limitation period of 2 years or 1 year, as the case may be, will apply only to transactions made on or after 01.12.2016 and not beyond that date. In the present case, the transactions were made before 01.12.2016. Hence no provision of IBC applies to such transactions.

Judgments relied on –

- (4) *AIR 1984 87- Paras 16-20, 32, 24*
Punjab Tin Supply Co. V. Central Government
- (5) *AIR 1996 SC 238 - Para 15-18*
R. Rajgopal Reddy Vs Padmini Chandrashekharan

It is held in the above judgments that all laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intention is clear and compulsive.

The argument advanced by the learned counsel is regarding prospective legislation. No doubt every statute implies prospectively unless the retrospective effect is given in the legislation itself. In this case sections 43, 45, 60(5)(a), 66 and 25(2)(i), came into force on or after 01.12.2016 and are not made applicable retrospectively. It is pertinent to mention that the code itself has provided a retrospective effect to the provision of section 43 (4) (a) wherein it is stated that "it



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is given to a related party, during two years preceding the insolvency commencement date”.

The above provision indicates that the retrospective effect is laid down in the legislation itself and is two years preceding the insolvency commencement date for a related party and one year for other than the related party. Thus, the look-back period for the transactions is made dependent on the insolvency commencement date, and not on the date when the insolvency and bankruptcy code came into effect.

Thus, in this case, look-back period available for the transactions commences from 10th August, 2015 for the related party.

The answering respondents emphasized the exclusion clause, i.e. sub-section (3) of section 43 of the Code which is given as under:

Sub-section 3 of section 43 of IBC:

“For the purposes of sub-section (2), a preference shall not include the following transfers—

- (a) a transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee.

The learned counsel representing the ICICI Bank and Standard Chartered Bank has emphasized that the bank which has acquired the mortgagee rights upon the mortgage properties in a legal and bona fide manner in the ordinary course of business or financial affairs of the corporate debtor. It is further submitted that under the Consortium mortgages and Exclusive Mortgage, the answering respondent is the beneficiary of the interests. The answering respondent i.e. beneficiary of the interest, is a bank, duly authorized by the RBI amongst other things, to carry out the business of commercial lending on a secured basis. It is customary for the answering respondents and other banks to seek credit enhancement on account of outstanding debts by way of creation of security interests by borrowers and their group companies.



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The argument advanced by the learned counsel is based on the premises of Exclusion Clause of section 43 and on this basis it is contended that the impugned transactions cannot be treated as preferential transactions because the bank is duly authorized by RBI amongst other things to carry out the business of commercial lending on a secured basis. It is further said that for credit enhancement on account of outstanding debts, the creation of security interest by the borrower is in the normal course of business of the bank. Therefore, the impugned transactions cannot be treated as preferential transactions given the exclusion clause, i.e. sub-section 3 of section 44.

It is true that exclusion clause of section 43 excludes transactions like “transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee”.



But the transaction of creating a security interest by way of mortgage in favour of lenders of the third party, i.e. holding company of the corporate debtor, on the unencumbered land of the corporate debtor without any consideration or counter guarantee cannot be treated as transfer in the ordinary course of business or financial affairs of the corporate debtor. (The language of the exclusion clause itself indicates that the “the transfer made in the ordinary course of business or financial affairs relates to the corporate debtor”. This cannot be interpreted that the ordinary course of business also includes transferee’s ordinary course of business because transferee can never do the transfer himself). Mortgage of land/assets of Corporate Debtor for the benefit of JAL cannot be said to be made in ordinary course of business of Corporate Debtor or made in financial affairs of Corporate Debtor as it did not benefit either the business or finances of Corporate Debtor in any way. Transfer made by Corporate Debtor, is for the benefit of the related party, therefore, cannot be excluded under the sub-section 3 of Section 43.

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The Word “the transfer made” itself indicates that it relates to the transferer and not the transferee. Therefore, the ordinary course of business of transferee bank will not exclude the transactions from the purview of preferential transactions.

The applicant Resolution Professional has reported that “on examination of records of the Corporate Debtor accessible to the applicant, he could not find any approvals obtained from the Lenders of the Corporate Debtor to mortgage its immovable properties as detailed above in favour of lenders of a related party, i.e. JAL. While nominees for lender attended the Board Meeting of the Corporate Debtor in which the decision to mortgage the land was taken, that cannot be treated as approval/no objection of lenders as lenders invariably have covenants in loan agreement that require their approval to be obtained for creating interest in favour of any one of the unencumbered assets of the borrower. Further, on examination of the records, the applicant has also reason to believe that no shareholders’ approval was obtained to mortgage the land of the corporate debtor in favour of the lenders of JAL. It is pertinent to note that when the Mortgage was created, the corporate debtor was already in default to its lenders and it is unlikely that the Lenders of Corporate Debtor would have provided no objection to creation of mortgage to secure debt of related party as that would have compromised recovery of not only their dues but also the interest of thousands of homebuyers waiting for their flats in which their hard earned monies have been invested. The same for fixed deposit holders.

The applicant RP contends that the said Transactions of Creation of Mortgage of 858 acres of land to secure the debt of related party is clearly a fraudulent and wrongful transaction under section 66 of the Code as it has been carried on with the intent to defraud the creditors of the Corporate Debtor.



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Since the Corporate Debtor was facing financial stress and was unable to honour its project completion deadlines and failed in its commitment to deliver possession of flats to homebuyers in time, it was facing litigation from flat buyers in some Forums. The corporate debtor has approximately 30,000 flats under construction. The mortgage was created in complete disregard to the interests of the Creditors and Stakeholders of the Corporate Debtor and the homebuyers at large. It has defaulted in payment of loans, and other financial assistance borrowed from financial creditors, including fixed deposit holders. Its account was declared as a non-performing account (from now on "NPA") on 30th September, 2015 by LIC and on 31st March, 2016 by other lenders. The Corporate Debtor was in dire needs of funds during this period and was facing severe liquidity crunch to complete the construction of projects and deliver the flats to homebuyers, as well as honour the payment obligation to financial creditors including the fixed deposit holders. Since the Corporate Debtor itself was in dire need of funds and could have sold/mortgaged unencumbered land to raise funds to complete construction of flats in a timely manner and to fulfil its obligation to its creditors and prevent value deterioration or insolvency, but, it chose to give away the land to secure the debt for a related party. The mortgage was created in complete disregard to the interest of the creditors and stakeholders of the Corporate Debtor. Now JAL has defaulted to its lenders exposing the mortgaged land to the risk of being sold to recover the dues payable by JAL".

The sub-section (1) of Section 66 of the Code provides that if during the corporate insolvency resolution process, it is found that any business of the corporate debtor has been carried on with the intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Tribunal may on application of The Resolution Professional pass an order directing any persons who were knowingly parties to



carry on the business in such manner shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit. Sub-section (2) of section 66 states that if before the insolvency commencement date, a director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of corporate insolvency regulation process (CIRP) in respect of the corporate debtor; and such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor, such director shall be liable to make such contribution to the assets of the corporate debtor.

Admittedly Directors of the corporate debtor and its related party, i.e. JAL were well aware of the fact that the corporate debtor was in default of the financial creditors, operational creditors, creditors (including home buyers) and other stakeholders. The directors were aware that the account of Corporate Debtor had been declared as NPA by LIC and other creditors. They were defaulting in timely construction, completion and delivery of flats to homebuyers. They were further defaulting payment to the fixed deposit holders. Therefore, The Directors of the Corporate Debtor were fully aware that they were in the twilight zone and insolvency was imminent. The Corporate Debtor ought to have exercised due diligence in minimizing the potential loss to the Financial Creditors, Operational Creditors, creditors (including home buyers) and other stakeholders of the Corporate Debtor. However, evidently, The Directors of the Corporate Debtor despite being fully aware of the said factum of default admittedly failed to exercise due diligence in minimising the potential loss to its creditors and entered the transactions which were on face-of it were entered to give benefits to its related party with a clear intent to defraud its creditors. This land could have been sold today to generate cash that would have been sufficient to complete the construction of flats. The flat buyers are directly affected adversely by this decision.



On perusal of the letter issued by the Resolution Professional it appears that he sought an explanation from the Mortgagee ICICI Bank regarding the transactions mentioned below.

S.N.	Details of property	Initial Mortgage
1.	100 acres of land situated at village Tappal, Khair, Aligarh	Dated 12 May 2014 in favour of ICICI bank limited, against the facility agreement dated 12 December 2013 granting term loan of ₹ 1500 crore and an overdraft of an amount of ₹ 1.75 crores to JAL.
2.	158.1739 acres situated at village Jaganpur & Aurangpur	Mortgage is dated 7 March 2017 is executed by JIL in favour of IDBI trusteeship services Ltd in the capacity of security trustee for the term loan of ₹ 1200 crores granted by ICICI bank limited to JAL against the facility agreement dated 25 May 2015.
3.	151.0063 acres of land situated at village Zikarpur, Khair, Aligarh.	Mortgage deed dated 7 March 2017 executed by JIL in favour of IDBI trusteeship services Ltd in the capacity of security trustee for a term loan of ₹ 1200 crores granted by ICICI bank limited to JAL against the facility agreement dated 25 May 2015.
4.	151.0063 acres of land situated at village Zikarpur, Khair, Aligarh.	Mortgage deed dated 7 March 2017 executed by JIL in favour of IDBI trusteeship services Ltd in the capacity of security trustee for a term loan of ₹ 1200 crore granted by ICICI Bank to JAL against the facility agreement dated 25 May 2015.
5.	166.229 acres of land situated at village Chagan, Chalesar, Agra	Mortgage deed dated 29 December 2016 executed by JIL in favour of Axis Trustee Services Ltd to provide as additional security for a term loan of rupees 23,490.75 crores sanctioned by various financial institutions as a consortium,



		including ICICI bank limited to JAL.
6.	166.9615 acres of land Kansera, Aligarh situated at Tappal,	Mortgage deed dated 29 December 2016 executed by JIL in favour of Axis Trustee Services Ltd to provide as additional security for a term loan of ₹ 23,490.75 crores sanctioned by various financial institutions as a consortium, including ICICI bank limited to JAL.

It is also mentioned in the notice to ICICI bank that “as you are aware, the corporate debtor started defaulting on payments of its dues to its financial creditors and was declared as NPA by the Life Insurance Corporation of India in September 2015 and some other lenders in March 2016. The creation of interest by the promoters and Directors of JIL in its immovable property, in favour of financial creditors of a related party, without economic gain, amount to a wrongful transaction by the promoter of JIL. To undertake such transaction when JIL itself was/is facing financial distress due to which it is unable to complete construction of flats and honour its commitments to the customers and pay its creditors is a serious matter. 858 acres of land is valued at thousands of crores of rupees and could have been available to raise money to complete construction of project for the benefit of thousands of homebuyers”.

In another notice sent to Standard Chartered bank the resolution Professional has sought full disclosure, explanation or justification regarding the following transaction;



Mortgage deed dated 24 th May 2016 for 25.0040 acres of land situated at village Sultanpur, sector-128, Noida, district-Gautam Budh Nagar, U.P.	Executed on 24 May 2016 in favour of IDBI trusteeship services Ltd, as additional security, again the facility agreement dated 29 August 2012 between SCB and JAL of ₹400
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	crores. The security was further extended for facility IIInd for ₹ 450 crores on 27 December 2012; for facility 3 rd ₹ 538.16 crores on 29 th April 2015; for facility 4 th for ₹ 81.84 crores on 29 th April 2015 and working capital facility of ₹ 297 crores on 29 August 2012.
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It is on record that the ICICI bank has submitted a reply to the notice wherein it is stated that "due to administrative reasons, in order to extend Consortium Mortgages in favour of additional lenders of JAL, the Margate deeds dated 15 September 2015 in respect of the consortium mortgages were momentarily released and immediately replaced by mortgage deeds dated 29 December 2016 recreating security over the same land and in respect of the same debt as under the consortium mortgages, with only addition of the additional lenders to JAL. This momentary release and immediate recreation of security were consented to by ICICI bank only for the convenience and benefit of JIL, and this should not be regarded as a substantive event; creation of the security by JIL was on 15 September 2015 and should be considered as such for this evaluation.



In respect of mortgages listed in paragraph 1 (b) of this letter (collectively exclusive mortgages), it is clarified that the exclusive mortgages, to the extent created by the mortgage deed dated 12 May 2014 and as contained in paragraph 1 (b) (i) of this letter, has been satisfied. The said exclusive mortgage dated 12 May 2014 was created vide separate mortgage deed to secure facilities which have been repaid in full, i.e. Term Loan of ₹1500 Crores under facility agreement dated 12 December 2013 and an overdraft facility of INR 1 75 crores granted to JAL by ICICI.

It is further stated by ICICI bank that the impugned transactions are not preferential transactions under section 43 (2) of the IBC.

The learned counsel representing JAL has in their written submission regarding the impugned transactions stated that:

DETAILS OF IMPUGNED MORTGAGES –

- (i) “Given in our reply (JAL) para V/Page 13 onwards – show that mortgages were not created for the first time after Corporate Debtor started facing the financial problem. The practice was continuing since 2009. From the details as given in Para V, a statement showing Year wise status of Mortgaged Land was placed before this Tribunal, **which reveals the total land area mortgaged on different dates** as under -

31.03.2015 -	1043.55 Acres
08.08.2015 -	1043.55
31.03.2016 -	893.55
08.08.2016 -	858.37
31.03.2017 -	858.37
08.08.2017 -	858.37



The above figures are quite revealing and in themselves sufficient to demolish the case of fraudulent mortgaging of land when ‘Corporate Debtor was in the twilight zone, and insolvency of Corporate Debtor became imminent’ built by the RP. The figures clearly show that no additional land was mortgaged by Corporate Debtor after 08.08.2015 but on the contrary mortgaged land area was considerably reduced.

- (ii) Proposals for creation of Mortgages were approved by BOD in meetings held on 27.05.2009, 12.11.2012, 11.02.2013, 12.11.2013, 09.02.2015, 28.05.2015, 06.08.2015, 11.02.2016, 26.05.2016 [Our Reply Page 23]. The mortgages were approved unanimously by all directors without any note of dissent by any one. The minutes are circulated to all directors/lenders and confirmed in the next BOD meeting. Even at the stage of confirmation or at any subsequent date no objection was received by Corporate Debtor from anyone.

(iii) **COMPOSITION OF BOD:** already given earlier, the BOD was dominated by independent directors who are governed by the Code of Conduct laid down in Schedule IV to the Companies Act, 2013. The promoter/Directors were in the minority. Hence, the contention of RP that all directors have conspired and connived is an absurd proposition.

(iv) **BOD MINUTES:** Minutes of Meeting held on 28.05.2015 – Application Page 370

At page 386 – Reasons for delay in completion of flats – NGT order dated 28.10.2013 referred.

At page 396 – Additional loan of Rs.2,000 Cr granted by IDBI approved.

At page 397 – Proposal for raising Rs.1,500 Cr through NCD for meeting funds requirement for real estate and other capital expenditure to be issued to Axis Bank on private placement basis approved.

At page 399 – mentions that mortgage of 40 acres is collateral security and was a continuation of the earlier mortgage.



(v) **JLF MINUTES:** The JLF minutes show that lenders and Corporate Debtor were concerned about the interest of flat buyers and depositors. The allegation made by RP that directors did not take care of the interest of flat buyers and depositors is wrong. Reference is invited to following pages of our Reply – Volume VI

Meeting dated 28.03.2016 – Minutes at page 2688- at page 2689-2690

Meeting dated 18.04.2016 – Minutes at page 2695 – at page 2695, 2697-2698

Meeting dated 04.06.2016 – Minutes at page 2703 – at 2703 – 2708

Meeting dated 04.02.2017 – Minutes at page 2710 – at 2710-2716

Meeting dated 08.03.2017 – Minutes at page 2721 – at 2721-2723, 2725-2727

Meeting dated 17.06.2017 – Minutes at page 2740 – at 2740, 2741

Core Committee Meeting Minutes dated 05.05.2017 – Minutes at page 2731- at all pages

(vi) **LIMITATION:** For computing the relevant period u/s 43(4), 45 and 46, the above BOD meeting dates are relevant. The execution of mortgage deeds is an only administrative function which is not relevant. The BOD has approved the mortgages before the commencement of IBC, i.e. 1.12.2016. Hence the same is not open to scrutiny under IBC as the law is

not retrospective. In any case, the mortgages were approved by BOD more than one year before the date of commencement of insolvency process on 09.08.2017. Hence the relief sought in the Application is patently time barred.

- (vii) **DISCLOSURE AND APPROVAL OF TRANSACTIONS** – Our Reply Para VI/ Page 23 – The transactions of mortgages were not made clandestinely, but detailed disclosure was made in each year's published Accounts (copies in Vol. 5 of our Reply) as per details are given in Para VI of our Reply and the same are summarized below –

FY	Relevant Page of Reply
2009-10	2092
2010-11 -	3131
2011-12 -	2170
2012-13 -	2213
2013-14 -	2250/2268
2014-15 -	2334/2356
2015-16 -	2431/2454
2016-17 -	2543/ 2578



The above Accounts were circulated to shareholders, placed in AGM and approved by shareholders, filed with ROC, submitted to all the lenders, placed on the website of Corporate Debtor, sent to Stock Exchange and placed on their website and also on the website of MCA. These have been within the public domain and not confidential documents.

SHAREHOLDERS' APPROVAL –

Approval of shareholders was not required given exclusion of infrastructure companies from the purview of Section 186 of the Companies Act, 2913 vide sub-section (11). JIL is an infrastructure company as defined in Schedule VI to Companies Act. In any case, it is settled law that when Accounts are approved by shareholders then disclosures made therein are also approved. Judgment relied on:

(10) 1993(77) Co. Cs. 1 (Karn) – Para 9-20

Chamundi Chemicals & Fertilizers Ltd. V.M.C. Cherian

LENDERS APPROVAL-

Lenders have their nominee director on BOD of Corporate Debtor and such nominee directors were party to the decision. The observation of RP that loan agreements provide that approval by nominee directors does not imply approval of lenders is fallacious. Such clause in loan agreements is protective and becomes relevant when a lender subsequently objects to some decision of BOD. In the present case, no lender has objected to the decisions in question till date. Lenders of JAL, who

represent 80% of the exposure in Corporate Debtor, are objecting to the present Application.

The fact that lenders' approval was there is established from the Minutes of JLF dated 08.03.2017 [at page 2727 of our Reply] in which for the first time, the lenders advised the Corporate Debtor not to create any mortgage or charge on any assets/ land parcels without the approval of JIL lenders.

The RP does not represent the lenders and has no right to raise above objection or to observe that lenders would not have given their approval if Corporate Debtor had approached them. Such an observation is a figment of his imagination and without any authority.

(viii) **ABSENCE OF COUNTER GUARANTEE:** The contention of RP that mortgages were effected without giving any counter guarantee, is devoid of any merit. Absence of counter guarantee does not affect the interest of Corporate Debtor in any way and its right to recover the payment made/loss caused to it in case the mortgages are enforced, is protected under section 69 of the Contract Act. A counter guarantee would have been merely a paper exercise for self-satisfaction which was not necessary for view of very close and special relationship between Corporate Debtor and JAL.

(ix) **SALE OF 858 ACRES OF LAND TO RAISE FUNDS WAS NOT NECESSARY-** The contention of RP that instead of mortgaging 858 acres of land, Corporate Debtor should have sold it to raise funds to complete the construction of flats, is devoid of any merit. It is submitted that a businessman does not jump to sell its property to meet temporary liquidity problems. Disposal of property is a measure of last resort. In the present case, the need to sell the property was neither contemplated by lenders who were considering the restructuring plan nor was it felt necessary by Corporate Debtor since alternatives were available. It was a commercial decision for which JLF and BOD of Corporate Debtor were capable and competent to take. It does not seem appropriate on the part of RP to tell how they should have worked. If the sale of land was at all required, then Corporate Debtor had 741 acres of unencumbered land which would have been sold. The RP has been incharge of the affairs of Corporate Debtor for almost nine months, and he has not moved any application in SC/ NCLT seeking permission to sell any part of 741 acres unencumbered land to meet the requirement of funds for completing the construction of flats.

(x) **Payment made to JAL –** In para XX/ Page 9 of Application, RP has stated that ever since the incorporation of Corporate Debtor, an amount of approximately Rs.15,900 crores have been paid to JAL. There is no allegation that said payments were illegal or unjustified or money was siphoned off. The nature of these payments has been clarified by JAL in its Reply Para (13) at page 52. In RA Para 12-13, the RP has not controverted the above facts.



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- (xi) It is relevant to point out that in the Application, except questioning the impugned mortgages, there is no allegation of any fraudulent conduct of business, misappropriation, siphoning of funds or even mismanagement etc.

The argument has been advanced that perusal of details of mortgages will show that mortgages were not created for the first time after corporate debtor started facing the financial problem. The practice was continuing since 2009.

The applicant is questioning the business decisions taken by the directors of The Corporate Debtor which were taken at the relevant time keeping in view the facts and circumstances then prevailing and in good faith and after due diligence. The applicant has no legal right to question the economic wisdom of the directors of The Corporate Debtor and the lenders and has no legal right to say that they ought to have acted only in a particular manner. The Board of Directors who took the decision were not only lower level executives having limited knowledge but comprised of senior officers of the Lenders as their Nominee Directors, and also Independent Directors appointed as per prevailing legal requirement and had considerable experience and expertise in the field of finance and business management.

It is pertinent to mention that the account of the corporate debtor was declared as Non-Performing Asset on 30.09.2015 by LIC and on 31.03.2016 by other lenders.

RP has filed the copy of minutes of the Board Meeting dated 28 May 2015 and 6 August 2015, Annexure A-8, copy of minutes board meeting dated 11th for February 2016, Annexure A-9, minutes of board meeting dated 10 September 2016 Annexure A-10, minutes of board meeting dated 5 December 2017 Annexure A-11 which clearly shows that the board of JIL passed resolution to mortgage unencumbered land of JIL in favour of lenders of JAL in spite of the fact that the corporate debtor



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account was declared as the NPA and in none of the board meetings liquidity crunch of JIL was even discussed.

The JAL in its reply has stated that with a view to overcoming the liquidity problem of the Corporate Debtor a Joint Lenders Forum (JLF) was constituted in the year 2015, which held a number of meetings and the senior is critical of the Corporate Debtor and the lenders have been making hectic efforts since 2015 to work out viable Restructuring Plan for the Corporate Debtor. The JLF was constituted as per RBI circular dated 26 February 2014 read with circular dated 5th May, 2017. The copies of minutes of various meetings of JLF and Core Committee held on different dates during 2016 and 2017, i.e. on 1st March, 2016, 28th March, 2016, 18th April, 2016, 4th June, 2016, 4th February, 2017, 8th March, 2017, 5th May, 2017 and 17th June, 2017 is annexed with the reply as Annexure-R-47. It is also stated that the status of the land and the impugned transactions were duly disclosed to the consortium of lenders led by IDBI Bank in the presentation made on 8 March 2017

(Annexure-R-48).



On perusal of the above minutes of JLF and core committee meeting, it appears that approval of JLF was not taken for the impugned transactions. It is important to point out that the corporate debtor was facing financial crunch and its account was declared as NPA, Joint Lenders Forum, a core committee of lenders was constituted under the directions of RBI and meeting of JLF was also held during 2015-2017. In the circumstances, why approval of JLF was not taken for the impugned transactions whereby unencumbered land of the corporate debtor was mortgaged to create security for the debt of JAL, i.e. a holding company of the corporate debtor.

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It is pertinent to mention that Minutes of the Senior Level Joint Lenders Forum meeting dated 8th March, 2017 which is at page number 2721 of the reply of the Jaiprakash Associates Ltd (JAL). It is stated in the minutes at page 2727 that.

“Further, JLM lenders advised the company to not to create any mortgage/charge on any asset/land parcel without approval from the JIL lenders.”

Relying on the above resolution of the JLM, it is contended that before 8 March 2017 there was deemed approval of the JLM because before this there was no such prohibition on the mortgage of asset/land parcel of the Corporate Debtor without prior approval of the JIL lenders. This argument has no force because of the only inference which could be drawn from the above statement is that JLM prohibited mortgage of the land of the corporate debtor without prior approval of JIL lenders.

It is important to point out the minutes of JLF meeting dated 28 March 2016

which is at page no.2688 of reply of JAL. In the said minutes it is stated that;

A. Debt Asset Swap :

A total of 1737.4 acres spread across four land parcels, having distress value of ₹14,548 crores, as per IDBI's empanelled Valuers Report of October 2015 has been mortgaged to lenders. The company also has certain unencumbered land which it proposes to swap, along with the part of the mortgaged land, towards the reduction of part of its debt as also for clearance of overdues. The details of land parcels proposed to be swapped are as under:

S.N.	Description	LP-2, Jaganpur	LP-3 Mirzapur	Total	Grand total
1	Residential	A-Mortgaged 250 B- unencumbered 50	A- 196 B- 81	A- 446 B- 131	577
2	Commercial	-	A-31	A-31 B -Nil	31
Total		Mortgaged -250 Unencumbered -50	Mortgaged-227 Unencumbered- 81	Mortgaged -477 Unencumbered- 131	608



Total 608 acres of land are proposed to be swapped @ Rs.6.50 crore per acre, and the proceeds of ₹3900 crores would be appropriated as under;

Towards reduction of debt : ₹3500 crores

Towards interests Overdues : ₹400 crores

The said land shall be transferred to a trust to be set up by the company, and the lenders shall be the beneficiaries. The land would be sold within a maximum period of 60 months, and the proceeds will be distributed among the lenders. Any upside over and above the minimum assured return shall be shared in the ratio of 60%-40% between the lenders and the company. The company has assumed minimum land value rate of ₹ nine crores per acre. There was an apprehension among the bankers whether the said rate could be obtained. Shri Gaur mentioned that the land parcels proposed for the swap are strategically located near Yamuna Expressway and Formula F1 track and would appreciate in value over a period of time."



By the minutes of JLF dated 28th March, 2016 it is clear that that JLF decided to transfer the land to a trust to be set up by the company and the lenders shall be the beneficiary. But it appears that the corporate debtor has not followed the decision of JLF and contrary to the above decision the corporate debtor has mortgaged the unencumbered land to the lenders of JAL.

Therefore, it is clear that the said transactions have been done not only without the consent of the Joint Lender Forum but also contrary to the decision of JLF.

In reply to the application of Resolution Professional, details of transactions have been given by respondents no.1, 2, 3, 4, 9, 13 & 14 at page 14, which is as follows:

S.N.	Date of initial mortgage	Description	Particulars of registration	Remarks
1	24 February 2015	Mortgage deed for 167.23 acres	Registered on 24 February 2015	Initially mortgaged
2	24 February 2015	Mortgage deed for 167.96 acres of land.	Registered on 24 February 2015	Initially mortgaged

The details of a mortgage given at serial number 1 and 2 were subsequently extended/substituted/released/recreated on different occasions under a change in the amount of facility or the terms and conditions of the financial assistance, availed by JAL, as detailed above.

A.167.23 acres of land at LP-5 at Agra

1	15 September 2015	Release deed for 167.23 acres	Registered on 24 September 2015	Released with a simultaneous mortgage
2	15 September 2015	Indenture of mortgage for 167.23 acres of land	Registered on 24 September 2015	under a change in facility amount from an aggregate of ₹ 3250 crores to an aggregate ₹ 24,109 crore
3	29 December 2016	Release deed for 167.23 acres	Registration number 14149 of 2016,DT. 29 December 2015	
4	29 December 2016	Indenture of mortgage for 167.23 acres	The expression number 14150 dated 29 December 2016	Released with a simultaneous mortgage under a change in facility amount from an aggregate of ₹ 24,109 crores to an aggregate of ₹ 23,490.75 crore

B-166.96 because of land LP-4, i.e. Tappal.

1	15 September 2015	Release deed for 166.96 acres of land.	Registration number 1,00,73 dated 24 September 2015	Released from an aggregate of ₹ 3250 crores to an aggregate of 24,109 crores.
2	15 September 2015	Indenture of mortgage for 166.96 acres of land	Registered on serial number 10074 dated 24 September 2015	
3	29 December 2016	Release deed for 166.96 acres of land.	Registered serial number	Released with a simultaneous mortgage



			11,637 dated 29 December 2016	<u>under a</u>
				<u>change in</u>
4	29 December 2016	Indenture of mortgage for 166.96 acres of land	Registered serial number 11,638 dated 29 December 2016	<u>facility</u>
				<u>amount from</u>
				<u>an aggregate</u>
				<u>of ₹ 24,109</u>
				<u>crores to an</u>
				<u>aggregate ₹</u>
				<u>23490.75Crore</u>

The learned counsel for the respondent contended that the details of a mortgage given at serial number 1 and 2 of this table shows that no new mortgage has been created by the impugned transactions. In fact, the land was encumbered before look back period, i.e. two years from the date of commerce of insolvency proceeding and by the said transactions earlier mortgage was released, and on the same day, fresh mortgage deed has been executed.

It is pertinent to mention that at serial number 1 and 2 transactions of land measuring 167.23 acres at the LP-5 is given which shows that that 167.23 acres of land were earlier mortgaged, but it was released on 15th September, 2015 vide Registration No. 13,992 dated 24th September, 2015, The same land was again mortgaged on 15th September, 2015 by Registration No.13993 dated 24th September, 2015 with a change of facility amount from an aggregate of ₹3,250 crores to aggregate ₹24,109 crores.

The above data itself is alarming. On examining the details of transaction it appears that after the release of mortgage on 15th September, 2015 fresh mortgage was created with a change of facility from 3250 crores to 24,109 crores. It is apparent from the face of the record that fresh mortgage has been created with an additional liability of 20,859 crores. The Corporate Debtor has taken this liability for a 3rd party, i.e. holding company JAL without the approval of Joint Lenders Forum inspite of




the fact that Corporate Debtor was facing liquidity crunch and its account had been declared as NPA.

The learned counsel for JAL submitted that the fresh mortgage deed is in continuation of the earlier deed. This argument has no force because earlier mortgage was released by executing Registered Release Deed and there after fresh Mortgage Deed was executed. In one transaction only we see that by mortgage of 167.23 acres of land, additional loan facility of 20,859 crores was granted to a related party JAL, without any consideration to the corporate debtor. Similarly in another transaction of 166.96 acres of land, Release Deed after that mortgage deed was created on 15th September, 2015 and additional facility of 20,859 crores was availed by related party JAL, i.e. holding company of the corporate debtor, and

that too without any consideration.



Avoidance proceedings are one of the crucial measures in saving the value of an insolvent entity under liquidation. The UNCITRAL Legislative Guide on Law of Insolvency defines avoidance proceedings as “provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the *collective interest* of creditors”. The avoidance proceedings are intended to target and reverse the effect of so-called “vulnerable transactions”. Preference transactions are one such often-talked about vulnerable transactions, and may take different forms.

Generally, the laws specify the rules to identify and classify transaction as preferential or otherwise. However, courts have, time and again, looked for the spirit of these rules.

Preference is “favour”, preference is “bias”. So where a creditor is unduly favoured by the debtor which adversely affects the collective interest of all creditors in a liquidation scenario, it is called a preference. The UNCITRAL

Legislative Guide on Law of Insolvency defines “preference” as a transaction which results in a creditor obtaining an *advantage* or *irregular payment*.

Section 43 of the Code entitles the liquidator or the Resolution Professional to apply to the adjudicating authority for avoidance of ‘preferential transactions’ entered into by the corporate debtor wherein the corporate debtor has given ‘preference’ at the ‘relevant time’ to ‘any persons’ referred to under the section.

As may be inferred from section 43 (2), in order to establish that the transaction is a ‘preferential transaction’, it is important to bring the following to the fore –

- (i) There is “a property or an interest in the property” (collectively called “property” hereafter) “of the corporate debtor”;
- (ii) Such property is “transferred”;
- (iii) The transfer operates for the benefit of a creditor or a surety or a guarantor (referred to as “beneficiary”, for the sake of brevity);



The transfer is for or on account of an antecedent debt (operational/financial) or other liabilities, owed by the corporate debtor;

The transfer has the effect of putting the beneficiary in a better position that it would have been if assets were distributed in accordance with section 53 of the Code.

Exceptions have been carved out where the corporate debtor gets “new value” or where the transactions took place in “ordinary course of business”.

Here, it is also important to distinguish a preferential transfer and a fraudulent transfer. For example, where the transfer does not benefit a creditor, but a third party in such manner that the asset is put beyond the reach of all the creditors. Also, a transaction might be a preferential as well as a fraudulent transfer at the same time.

Following is the some of the aspects pertaining to preferential transactions.

A. PROPERTY OF THE CORPORATE DEBTOR

The subject of transfer must be property or an interest in such property of the corporate debtor. The expression “of the corporate debtor” may be interpreted so as to refer to assets that qualify to be included in the liquidation estate under section 36. What forms part of the liquidation estate, in terms of section 36, is to be distributed in terms of section 53. Therefore, if any action on the part of the corporate debtor has the effect of affecting the availability, marketability or value of the any of the ingredients of liquidation estate, must be covered by the section.

In a US ruling as well, the scope of the expression “interest in property” was taken to include everything that will otherwise go into liquidation estate. *Begier v. IRS*, 496 U.S. 53 (1990). In the case, it was held that “property of the debtor” is best understood to mean property that would have been part of the estate had it not been transferred. Its meaning is coextensive with its post-petition analog “property of the estate,” which includes all of the debtor's legal or equitable interests in property as of the commencement of the case.

B. SECURITY INTEREST AS PREFERENTIAL TRANSFER

Whether creation of security interest or collateral may come within the purview of ‘preferential transaction is to be observed’. It is an undisputed fact that a secured creditor is better placed than an unsecured creditor in insolvency/liquidation proceedings. Therefore, when a security is being offered to a creditor, he is being placed in a better position than other creditors. However, that does not necessarily result in preference. Grant of security interest, per se, is not preference, but may be proved to be a preference on fulfilment of conditions as above.

The rationale has been aptly explained in UNCITRAL Legislative Guide on Law of Insolvency (Part II: Treatment of assets on commencement of insolvency proceedings), as follows –

“ . . . they (security interests) may nevertheless be avoidable in insolvency proceedings on the same grounds that any other transaction might be challenged and avoided. The purpose of such an approach is to prevent a debtor that is not able to pay its debts from encumbering assets, unless the security interest provided is in



consideration of new funds being advanced. Otherwise, the encumbered assets will not be available to creditors generally and will place restrictions on the debtor's use of those assets. A transaction granting a security interest might be avoided on the basis that it is a transaction intended to defeat, delay or hinder creditors, or a preferential or undervalued transaction. In many cases, it will be a preferential transaction because it involves an existing creditor."

Examples of security interests which are vulnerable to being classified as "preferential" are –

- (i) grant of a security interest shortly before commencement of proceedings, which although otherwise valid, may be found to have favoured unfairly a certain creditor at the expense of the rest;
- (ii) the grant of a security interest to secure a prior debt or on the basis of past consideration (permitted in some legal systems, but not in others);
- (iii) payments to a secured creditor, if the secured creditor is under secured and is paid in full within the suspect period.



Section 239 of the Insolvency Act, 1986 (UK) does not specifically mention about creation of security interests. However, section 547 of the US Bankruptcy Code too talks about 'security interests' and "new value" in the context of "preferences".

So far as the Code is concerned, it may be noted that "transfer" is an omnibus expression encompassing "sale, purchase, exchange, mortgage, pledge, gift, loan, or any other form of transfer of right, title, possession or lien" – section 3(34).

"Security interest", as defined in section 3(31) of the Code, means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or

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performance of any obligation of any person, but excludes a performance guarantee.

Therefore, a transfer may be in the form of creation of security interest on the assets of the corporate debtor and thus, creation of security interest or collateral may get categorized into 'preferential transaction', where all other conditions as above are satisfied.

The view above is buttressed by the exclusion of those security interests which result in "new value" from being called as preferences. Sub-section (3) of section 43 carves out an exception as to the corporate debtor acquiring "new value" as a result of the security interest, in which case, the transfer (i.e. the means by which security interest was created) shall not be categorized into 'preferential transaction'.



In this case, it is undisputed that after the release of earlier mortgage deeds, fresh deed has been executed in favour of the creditors of JAL, which happens to be holding company of the corporate debtor. Holding company and subsidiary company are separate legal entities. After the release of earlier mortgage and creation of fresh mortgage cannot be treated as a continuation of the earlier mortgage. It is found that in two transactions after the creation of a fresh mortgage, additional facility worth Rs.41,718 crores has been granted in favour of JAL, in spite of the fact that corporate debtor was itself facing liquidity crunch and its account was declared as NPA and Joint Lenders Forum was formed to meet the situation. But without any prior approval of JLF, the Corporate Debtor has mortgaged its unencumbered land in favour of lenders of JAL and that too without any consideration. Thus it is clear that the said act appears to have been committed to defraud the creditors of the Corporate Debtor which are certainly preferential transactions covered U/S 43(2)(a) of the Code. Therefore, this issue is also decided in positive in favour of Resolution Professional.

After the elaborate discussion, we have decided that impugned transactions are preferential transactions as defined in the subsection (2)(a) of Section 43 of insolvency and bankruptcy code 2016. We have found that corporate debtor Jaypee Infratech Ltd (JIL) has by way of mortgage of unencumbered land created security interest in favour of lenders of the Jaiprakash Associates Ltd. (JAL), which happens to be the holding company of JIL, without any consideration. We have also found that the corporate debtor was facing liquidity crunch and their accounts were declared as NPA and even after formation of Joint Lender Forum, without obtaining approval from Joint Lender Forum, unencumbered land of the corporate debtor has been mortgaged in favour of lenders of JAL. There by this transfer has the effect of putting the JAL, one of the creditor of JIL in a beneficial position than it would have been in the event of distribution of assets being made by section 53 of the code.



The said mortgage of immovable properties, i.e. of the unencumbered land of the corporate debtor has been **made without any consideration to the corporate debtor**. Therefore the said transaction is covered under the umbrella of Sec 45(1) of the Code and will be treated as an undervalued transaction as defined under section 45 of the Code.

The learned counsel for JAL submitted that section 45 of the Code applies only to transactions **which are 'preferential transaction' and covered by section 43(2)**. Since, impugned transactions are **not covered by section 43(2)**, hence **section 45 does not apply**.

Even otherwise the transactions **cannot be treated 'undervalued transaction'** for the following reasons –

- transaction is not between Corporate Debtor and JAL
- Impugned mortgages were created as **collateral security which is a common practice in the banking industry**. Friends and associates come forward and give such collateral security for the debts of other without any financial consideration.
- Relationship between JAL and Corporate Debtor is very special – Kindly refer to Para VII/ page 36 of our Reply. As highlighted in this para, the Corporate Debtor is subsidiary of JAL, and in that capacity, JAL has been extending support to Corporate Debtor from time to time which in term of value amounted to thousands of crores. Impugned mortgages created by JIL as collateral security were **not unusual but merely reciprocal** and cannot be termed 'without consideration'.
- Under sub-section (11) of section 186 of the Companies Act, 2013, the creation of security **interests by an infrastructure company for securing the debt extended to other companies** including a holding company, are exempted from the provisions of the section. Corporate Debtor is an infrastructure company as defined in Schedule VI to the Companies Act, 2013. Hence, the transactions are not prohibited under law.

In this case, we have found that impugned transactions are covered under preferential transactions as defined in section 43(2)(a) of the Code. Therefore, it cannot be said that section 45 does not apply for these transactions.

The impugned mortgage of unencumbered land parcels of the Corporate Debtor in favour of lenders of the JAL to create a security interest are transactions



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between the Corporate Debtor, lenders of JAL and JAL, who happens to be an Operational Creditor of the Corporate Debtor.

It is true that the collateral security is common practice in loan transactions. It is on record that in this case, the Corporate Debtor was under liquidity crunch and its accounts were declared NPA by LIC and other creditors. The Joint Lender Forum was formed to deal with the situation. But the Corporate Debtor entered into the transaction even without taking prior approval of Joint Lender Forum and mortgaged its unencumbered land in favour of the lenders of the JAL.

In the circumstances stated above it is clear that the impugned preferential transactions are also undervalued transactions and covered under section 45(1) of the Code. It is also clear that these transactions are undertaken during the relevant period of 2 years from the date of initiation of Corporate Insolvency Process as provided under section 46(1)(ii) of the Code. Therefore, this issue is also decided in positive, in favour of applicant Resolution Professional and against the Corporate

Debtor.

In view of the above, it is clear that the mortgage of land of JIL in favour of lenders of JAL, amounts to transfer of interest in property of JIL for the benefit of its creditor i.e. JAL and putting it in a beneficial position vis-à-vis other creditors is a preferential transactions U/s 43(2)(a) & (b).

The transactions were executed within the look back period of two years before the commencement of Insolvency proceeding and is therefore covered U/s 43(4)(a). Further, transaction cannot be treated as in ordinary course of business or financial affairs of Corporate Debtor and is not excluded U/s 43(3).

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On the above basis, it is clear that the company application filed by the Resolution Applicant deserves to be allowed. Hence, is allowed.

ORDER

The company application filed by the Resolution Professional under Sec. 66, 43 & 45 of the Insolvency and Bankruptcy 2016 is allowed. The impugned transactions, details of which are given in the schedule of the judgment are declared as fraudulent, preferential and undervalued transactions as defined under section 66, 43 and 45 of the Code respectively.

Transactions given in the following schedule of property have been found as preferential, undervalued and fraudulent, therefore, we pass the order for release and discharge of the security interest created by the Corporate Debtor in favour of lenders of the Jaiprakash Associates Ltd. under the provision of Section 44(c) of the Insolvency and Bankruptcy Code 2016. We also pass an order under Section 48(a) of the Code that the properties mortgaged by way of preferential and undervalued transactions shall from now on be deemed to be vested in the Corporate Debtor.

Schedule of property (preferential, undervalued and fraudulent) :-



S.N.	Consortium of Banks & Financial Institutions as per the list attached
i.	Mortgage deed dated 29.12.2016 for 167.229 acres of land situated at Village Chhalesar and Chaugan, Tehsil Etmadpur, District Agra, U.P. executed by the Corporate Debtor in favour of Axis Trustee Services Ltd to provide an additional security for term loans of Rs.21081.5 crores sanctioned as a consortium to JAL.
ii.	Mortgage deed dated 29.12.2016 for 167.9615 acres of land situated at Village Tappal, Kansera & Jahangarh, Tehsil Khair, District Aligarh, U.P. executed by the Corporate Debtor in favour of Axis Trustee Services Ltd to provide as an additional security for term loans of Rs.21081.5 crores sanctioned by the consortium to JAL.

A copy of mortgage deed is annexed as Annexure- A-3 of the application.

S.N.	Details of exclusive mortgage in favour of ICICI Bank Ltd
i.	Mortgage deed, dated 07.03.2017 for 158.1739 acres situated at Village Jaganpur and Aurangpur, Uttar Pradesh, executed by JIL in favour of IDBI Trustee-ship Services Limited in the capacity of security trustee for term loan of Rs. 1200 crore granted by ICICI Bank Limited to JAL against the facility agreement dated 25.05.2015.
ii.	Mortgage deed, dated 07.03.2017 for 151.0063 acres situated at Village Jikarpur, Tehsil Khair, District Aligarh, Uttar Pradesh, executed by JIL in favour of IDBI Trustee-ship Services Limited in the capacity of security trustee for term loan of Rs. 1200 crore granted by ICICI Bank Limited to JAL against the facility agreement dated 25.05.2015.

S.N.	Details of exclusive mortgage in favour of Standard Chartered Bank Ltd ("SCB")
(i)	Mortgage deed dated 24.05.2016 for 25.0040 acres of land situated at Village Sultanpur, Sector-128, Noida, District Gautam Budh Nagar, U.P., 201 304 executed by the Corporate Debtor in favour of IDBI Trustee-ship Services Ltd, as additional security, against the facility agreement dated 29.08.2012 between SCB and JAL of Rs. 400 crores. The security was further extended for Facility II for Rs. 450 crores on 27.12.2012; for facility III for 538.16 crores on 29.04.2015; for facility IV for Rs. 81.84 crores on 29.04.2015 and for working capital facility Rs. 297 crores on 29.08.2012.

A copy of mortgage deed is annexed as Annexure- A-6 of the application.

S.N.	Details of exclusive mortgage in favour of State Bank of India ("SBI")
(i)	Mortgage deed dated 04.03.2016 for 90 acres of land situated at Village Chaugan Tehsil Elmadpur, District Agra, Uttar Pradesh, executed by JIL in favour of State Bank of India, against the facility agreement dated 26.03.2015 granting Short Term Loan Facility to JAL of Rs. 1000 crores.

As per Section 43 of the IBC, 2016, relevant period for the impugned transaction is starting from 10th August, 2015 to 9th August, 2017 (date of starting of CIRP). So Mortgage deed dated 12.05.2014 for 100 acres of land situated at Village Tappal, Tehsil Khair, District Aligarh, Uttar Pradesh, executed by JIL in favour of ICICI Bank Limited against the facility agreement dated 12.12.2013



granting Rupee Term Loan of Rs.1500 crore and overdraft for an amount of Rs.175 crores to JAL, will not come under the relevant time as provided under Section 43 of the Code.

Copy of this order may be communicated to the Resolution Professional through email as well as to the concerned Registrar of Companies for compliance.



Dated: 16.05.2018

SAROJ RAJWARE,
MEMBER (T)

V.P. SINGH,
MEMBER (J)

Typed by:
Kavya Prakash Srivastava
(Stenographer)