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

INV. NO. 85/ND/2023, IA. NO. 5303/ND/2023
IA-6434/ND/2023 and INV. NO. 02/ND/2024
IN
Company Petition No. (IB)-281(ND)/2023

IN THE MATTER OF (IB)-281(ND)/2023
(SECTION: 7 of IBC, 2016)

Sh. Ashish Kumar & Ors. ... Applicants/ Financial Creditors

Versus

Dwarkadhis Projects Pvt. Ltd. ... Respondent/ Corporate Debtor

AND IN THE MATTER OF INV. PETITION NO. 85/ND/2023:
(SECTION: 60(5) of IBC, 2016)

Sushil Kumar & Ors. ... Applicants/ Interveners

AND IN THE MATTER OF IA. NO. 5303/ND/2023:
(Section: Rule 11 NCLT Rules, 2016)

Dwarkadhis Projects Pvt. Ltd ... Applicant

Versus

Ashish Kumar & Ors. ... Respondents

AND IN THE MATTER OF IA. NO. 6434/ND/2023:
(Section: 60(5) of IBC, 2016)

Ashish Shukla & Ors. ... Applicants

Versus

Ashish Kumar & Ors. ... Respondents

AND IN THE MATTER OF INV. PETITION NO. 02/ND/2024:
(Section: 60(5) of IBC, 2016)

Nishant Joshi
Flat No. 784, Narmada Tower,
Mahagunpuram, NH-24,
Ghaziabad-201002

... Applicant/ Intervener

Order Delivered on: 06.03.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner	**:** Adv. Pulkit Deora, Adv. Vaishnavi Varshney, Adv. Anju Jain, Adv. Anisha Invt. IA-85/2023, Adv. Rishab Sachdeva in IA-6434/2023.
For the Respondent	**:** Adv. Mohit Chaudhary, Adv. Prakhar Mittal, Adv. Paras Mittal
For the Appellant	**:** Adv. Hitesh Sachar in IA-6434/2023
For the Intervener	**:** Adv. Anju Jain, Adv. Anisha in IA-85/2023

ORDER

The captioned application has been preferred under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Ashish Kumar & 77 Others, with a prayer to initiate the CIR process against M/s. Dwarkadhish Project. The facts as captioned in the Petition are that: -

(i) The applicants booked flats/plots/commercial units for being allotted by the Corporate Debtor. During the years 2014-15 and 2015-16, the Corporate Debtor started advertising for its various housing/residential

projects situated in Dharuhera, Rewari including the project DPL Casa Romana (earlier known as Aravali Green Ville). The projects are claimed as residential one. Each of the Applicants were issued Allotment Letters and Agreement to Sell indicating the details of Registration Number, amount paid by them/allottees along with the acknowledgment of the amount executed by the CD qua all the Applicants.

(ii) The Corporate Debtor failed to offer the possession of the flat/plot/ units as promised by it as also to pay the possession penalty (Rs. 5/sq. ft. per month), thus committed default.

2. The particulars of debt and default have been mentioned in Part-IV (1and 2) of the application/petition, which reads thus: -

PARTICULARS OF FINANCIAL DEBT	
1.	**PARTICULARS OF FINANCIAL DEBT GRANTED AND DATE OF DISBURSEMENT**
	The total amount of financial debt as regard to the Financial Creditors is **Rs. 38,87,64,702 (Rupees Thirty-Eight Crores Eighty-Seven Lakhs Sixty-Four Thousand Seven Hundred and Two Only)** towards the principal amount of money collected by the Corporate Debtor from the Financial Creditors under various schemes floated by the Corporate Debtor in context with project namely Casa Romana. The above said principal amount includes possession penalty/compensation upto 21.01.2023 but does not include the interest calculated.

Brief facts of the case are as under:

The present application is a joint application being filed under the provisions of Section 7(1) of I&B Code, 2016 on behalf of 78 Allottees (holding an interest in 79 units out of 737 allotted units in the subject project) who have booked flats/plots/commercial units with the Corporate Debtor. A **tabular chart** showing:

(i) The names of the Financial Creditors;

(ii) The Unit number of the allotted Residential Flats

(iii) The date of agreement to sell;

(iv) The date of possession of flat/ plots/commercial units as per agreement to sell / date of default and;

(v) The principal amount paid by them

(vi) The amount in Default

is annexed hereto and marked as **ANNEXURE A-6**

The Corporate Debtor, in the year 2014-15 and 2015-16, had started advertising for its various housing/residential projects situated in Dharuhera, Rewari, including DPL Casa Romana (earlier known as Aravali Green Ville) (the **Subject Project**)

The Projects were said to be residential Projects. The Applicant/Allottees were lured into buying units in the projects by promising that the Project will have ultra-modern architecture with State-of-the-Art Construction and World-Class Amenities with Largest Clubhouse in the Area and unique design upon the completion of project.

The Corporate Debtor had issued Allotment Letter to each Financial Creditor/Allottee and had promised to construct and deliver possession of the flats to the Home Buyers within the stipulated time.

Each Financial Creditor was issued and Allotment Letter and/ or Agreement to Sell, duly signed by the Corporate Debtor, detailing the registration number, amount paid by the allotee, along with an acknowledgement of the amounts paid. The **Allotment Letter /Agreement to Sell** executed with the Financial Creditors herein along with **acknowledgement receipt** issued by the Corporate Debtor are annexed hereto and marked as

ANNEXURE A-7(Colly)

However, the Corporate Debtor failed in its commitment to offer the possession of the flat/plot/commercial unit as promised by it and further failed to pay the possession penalty (Rs.5/sq. ft. per month). This failure of the Corporate Debtor to offer allotment of flat and compensation upon failure to

	deliver possession amounts to default for the purposes of the present petition under the Code.
2.	**AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED.** **(ATTACHED THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEAFULT IN TABULAR FORM)**
	The total amount of Financial Debt as regards to the Financial Creditors **Rs. 38,87,64,702 (Rupees Thirty-Eight Crores Eighty-Seven Lakhs Sixty-Four Thousand Seven Hundred and Two Only** towards the principal amount of money collected by the Corporate Debtor from the Financial Creditors. This Principal amount includes the possession penalty as per clause 15 of the Agreement to Sell but does not include the interest calculated.
	As per the Agreement to sell executed on various dates with the Financial Creditors in the class during the years 2014-2018, the Corporate Debtor was bound to complete the project and hand over possession within 48 months from the date of Agreement to Sell. Therefore, the possession was to be handed over to the Financial Creditors during the years 2018-2022. Further, it is pertinent to mention that the above-mentioned default is a continuing default on part of the Corporate Debtor, therefore the present application is well within the limitation period.
	A **tabular chart** showing: (i) The names of the Financial Creditors; (ii) The registration number of their particular allotments with the Corporate Debtor; (iii) The date of agreement to sell; (iv) The date of possession of flat/ plots/commercial units as per agreement to sell / date of default and;
	(v) The principal amount paid by them (vi) The amount in Default is annexed hereto and marked as **ANNEXURE A-6.** Further, in terms of the judgment of the Hon'ble Apex Court in ***Re-cognizance for extension of Limitation in MA # 21/2022 in MA 665/2021 in SMW (C) No. 3/2020 vide order dated 10.01.2022,*** the Hon'ble Supreme Court has inter-alia directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for purposes of limitation as may be prescribed under any general or specific law in respect of all judicial proceeding. A copy of the said **order dated 10.01.2022** is annexed herewith as

ANNEXURE A-8.

It is further relevant to mention that the Petitioners/ home buyers herein had filed Petition under Section 7 against the Respondent/ Corporate Debtor vide CP(IB) No.881 of 2022, on 16.11.2022, which came to be withdrawn with liberty to file afresh vide order dated 03.01.2023.

Copy of **orders dated** 03.01.2023, 13.12.2022, and 20.12.2022 are annexed herewith as **ANNEXURE A-9 and A-10(Colly).**

3. In the backdrop, the Applicants have espoused that the Corporate Insolvency Resolution Process need to be commenced qua the CD in terms of the provisions of clause(a) of sub-section 5 and sub-section 6 of Section 7, read with Section 5(11) of IBC, 2016.

4. To buttress that there is default committed by the CD in terms of the provisions of Section 3(12) of IBC, 2016, the Applicants have referred to Allotment Letters/Agreement to Sell and acknowledgment receipts issued/executed by the CD as evidence to prove the payment made by each Financial Creditor. The Applicants have enclosed the statements of their respective bank accounts as Annexure A-7 (colly.) to the application.

5. In the reply filed on behalf of the CD to oppose the application, it has been espoused thus: -

I. In terms of the view taken by the Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Limited and Another vs. Union of India (2019) 8 SCC 416, the present application is not maintainable, as the Applicants are 'non-genuine' and 'speculative investors'.

II. The application is hit by the 2nd proviso to Section 7(1) of IBC, 2016, as the Applicants who are actually allottee are less than 100 as also not 10% of the total number of allottees.

III. The aforementioned proviso i.e. Second Proviso to Section 7(1) of IBC, 2016, could be upheld by Hon'ble Supreme Court in Manish Kumar vs. Union of India 2021 (5) SCC 1.

IV. In order to increase the number of Applicants/allottee and to meet the threshold limit, 12 such persons who are not the allottees qua the project are added as Applicants in the Memo of Parties. In terms of the explanation (ii) to Section 5(8)(f) of the Code, the expression 'allottee' shall have the same meaning as assigned to it under Section 2(d) of the RERA and as per Section 2(d) of RERA, the 'allottee' can only be the person to whom a plot, apartment or building, as the case may be has been allotted. After cancellation letters, duly served upon the allottees and accepted by them, they ceased to have any grievance and cannot be treated as allottees for the purpose of Second proviso to Section 7(1) of IBC, 2016.

6. To define the expression allottee, the CD could refer to Real Estate (Regulation and Development) Act, 2016, and reproduced relevant excerpt thereof in Para 5A of the reply. The para reads thus: -

"A. ENACTMENT OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016, [RERA, FOR SHORT]

That certain provisions of RERA came into effect on 25th March, 2016 RERA with the Object that:

'...for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal.'

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

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

7. In para 5(B) of the Reply, the Corporate Debtor has made a mention about legislative history in respect of inclusion of Allottees in the definition of 'Financial Creditor'. The said para reads thus: -

"B. LEGISLATIVE HISTORY IN RESPECT OF INCLUSION OF:: 'ALLOTTTEE' U/S 5 (8) (F) Explanation AND ORDERS PASSED BY THE APEX COURT:

That on 28th May, 2016, IBC was enacted with the Object that:

> *"...to reorganisation and insolvency resolution of corporate persons... in a time bound manner for maximisation of value of assets... to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues..."*

Initially, there were 2 kinds of 'debts' recognized under IBC i.e. 'operational debt and 'financial debt"
Under Sec 5 (8) "financial debt"
Under Sec 5 (21) "operational debt"

From 6th June 2018 onwards, 'allottees' were inserted in Sec 5 (8) f so as to make the allottees as "financial creditor(s)". This amendment was challenged before the Apex Court, in following manner viz.

06.06.2018 *Sec. 5 (8) (f) was amended to bring in explanation and case of 'allottees' under the ambit, which reads as under:*

> *"**Explanation**. -For the purposes of this sub-clause, -*
>
> *(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
>
> *(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the RERA"*

09.08.2019 ***Judgment of Pioneer*** *delivered by SC, reported in (2019) 8 SCC 416, clearly barring the 'speculative investors', from taking developers for a ride.*

> *"... the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a fiat/apartment. They can also point out that in a real estate market which is failing, the allottee does not, in fact, want to go ahead with its obligation to take possession of the fiat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it..."*

28.12.2019 *By an amendment in Sec. 7 IBC a proviso is added to insert the threshold i.e. 100 allottees or 1/10th of the allottees of the project.*

> *"...Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project*

or <u>not less than ten per cent, of the total number of such allottees</u> under the same real estate project, whichever is less..."

19.01.2021 Judgment of Manish Kumar Vs. UOI reported in (2021) 5 SCC 1, pronounced by SC, upholding the validity of amendment made on 28.12.2019.

In present case the thresh-hold of 10% as upheld by the Apex Court is not met and therefore petition is not maintainable."

8. In the reply filed by it, the CD has also given the list of those Applicants, the allotment of flats made in whose favour could be cancelled. The clause iii of Para 6 reads thus: -

"iii After cancellation letters duly served and accepted by the below mentioned 12 persons, they cease to have any grievance and cannot prefer or join as allottee, these persons are rank outsiders. Detail of such bogus persons mentioned in 'memo of party' are as under:

SN.	Name of Party	Petitioner No	Date of Cancellation
1.	Ms. Rashmi Bali	FC56	29.09.2021
2.	Mr. Munindra Misra	FC43	29.09.2021
3.	Mr. Amber Prakash Rupesh	FC05	29.09.2021
4.	Mr. Vaibhav Tyagi	FC72	29.09.2021
5.	Mr. Bhagirath	FC15	29.09.2021
6.	Ms Kamal Jeet Agarwal	FC32	29.09.2021
7.	Mr. Jai Ram Vishwakarma	FC31	29.09.2021
8.	Mr. Om Prakash	FC48	29.09.2021
9.	Mr. Hari Om Sharma	FC29	29.09.2021
10.	Ms. Sushil Tanwar	FC71	29.09.2021
11.	Ms. Kalpna Jain	FC33	29.09.2021
12.	Ms. Kalpna Jain	FC33	29.09.2021

*True Copy of List of cancelled units and details of last payment is annexed herewith as **Annexure A-1.***

Thus, it is clear that above persons are third parties and outsiders who do not qualify in definition of 'allottee'. In view of the cancellation of allotment letters [due to non-payment] these persons can not have any 'date of default', which is a start point for consideration under Sec. 7 petition. For want of subsisting contract these persons are not 'allottee'.

True Copy of Cancellation letters Issued on 29th September 2021 to the mentioned allotees along with speed post receipt are annexed herewith as ***Annexure A-2."***

9. It is also the plea espoused in the reply filed on behalf of the CD that before issuance of the cancellation letters to the aforementioned Applicants, the Corporate Debtor had issued payment cum cancellation letters/reminders to the allottees, which clearly mention that in the event of non-receipt of payment, the Corporate Debtor will cancel the allotment made in favour of the allottees enlisted in clause iii of para 6 of the reply (ibid). Despite such reminder, no payment of the outstanding dues was made.

10. The further plea raised on behalf of the Corporate Debtor is that two of the persons mentioned in the list namely Vaibhav Tyagi and Amber Prakash Rupesh, were also party to a case filed before HRERA, by the Corporate Debtor being Complaint No. 2127 of 2019 and 2128 of 2019 respectively. The relevant excerpt of the reply reads thus:-

"v. *It is also relevant to note that in the above list (Point III), Mr. Valbhav Tyagi and Mr. Amber Prakash Rupesh, were also party to a case filed in HRERA by the Corporate Debtor being Complaint No. 2127/2019 & 2128/2019 respectively wherein the HRERA Authority Inter-alia has held as follows:*

"...The Authority is also of the considered view that in case the allottees continue to defauit in making due payments their allotment can be cancelled and the complainant company is entitled to forfeit their earnest money along with interest on the overdue payments...."

True Copy of Order dated 11.02.2020 passed by HRERA in Complaint no. 2127/2019 and 2128/2019 along with bunch matters Is annexed herewith as ***Annexure A-3.***

Status of petitioners in present matter –

Total No. of Allottees as on date of filing of Petition	10% of total Allottees as required by law:	No. of Applicant Allottees in present case
737	74	79 minus 12 Not allottees u/s 2(d) RERA = 67

Since applicants are less than 10% of the total number of allottees therefore case does not qualify in terms of the amended Section 7 of the Insolvency and Bankruptcy Code, 2016.

It is relevant to submit that the Petitioners have intentionally added persons with cancelled contract [without subsisting agreement] in the list of 67 to surpass the threshold limit by misleading this Hon'ble Tribunal. ***[Reliance on: Parveen Gakhar vs. Adani Goodhomes Pvt. Ltd. & Anr., Company Appeal (AT) (lns.) No. 228/ 2023]****"*

11. It is admitted by the CD that the total numbers of Applicants joined the petition are more than 10%, but since 12 of them are not covered by the definition of allottees, the number is reduced to 67, which is not 10% of total number of allottees viz 737, thus the petition is not maintainable. At the cost of repetition, the relevant excerpt of the para 6(iii) of the reply is reproduced thus: -

"iii. After cancellation letters duly served and accepted by the below mentioned 12 persons, they cease to have any grievance and can not prefer or join as allottee, these persons are rank outsiders. Detail of such bogus persons mentioned in 'memo of party' are as under:

SN.	Name of Party	Petitioner No	Date of Cancellation
1.	Ms. Rashmi Bali	FC56	29.09.2021
2.	Mr. Munindra Misra	FC43	29.09.2021
3.	Mr. Amber Prakash Rupesh	FC05	29.09.2021
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10.	Ms. Sushil Tanwar	FC71	29.09.2021
11.	Ms. Kalpna Jain	FC33	29.09.2021
12.	Ms. Kalpna Jain	FC33	29.09.2021

True Copy of List of cancelled units and details of last payment is annexed herewith as ***Annexure A-1.***

Thus, it is clear that above persons are third parties and outsiders who do not qualify in definition of 'allottee'. In view of the cancellation of allotment letters [due to non-payment] these persons can not have any 'date of default', which is a start point for consideration under Sec.7 petition. For want of subsisting contract these persons are not 'allottee'.

True Copy of Cancellation letters issued on 29th September 2021 to the mentioned allottees along with speed post receipt are annexed herewith as ***Annexure A-2.***

12. The Corporate Debtor has also pleaded that the petition is premature, as no default has yet been committed by it. Para 6(B) of the reply reads thus: -

> *"**6B. PREMATURE PETITION***
>
> ***Case setup before Adjudicating Authority is premature dehors the contractual clauses.***
>
> *i. As per the petitioners, pleadings at Pg. 47 [chart], reference to 'date of default' has been made in **Annexure A-6** of the Petition.*
>
> *ii. Annexure A-6 [pages 390-396] in 5th Column mention **'Date of possession agreed as per ATS'.** What is conveniently not mentioned is as to what clause of ATS is being referred to by the Petitioner(s) while giving details in this column.*
>
> *In any event. Clause 11 which has a heading **'Schedule of Possession'** [at pg. 485 of petition] reads as under:*
>
> *"11.1 The Developer based on its present plans and estimates should endeavor to complete the construction of the apartment within a period of **Forty Fight (48) Months computed from the date of receipt of all approvals/ Clearances/ Permission necessary for the construction and development of the apartment or from the date of commencement of construction of the particular Building/ Tower/ Block in which the Apartment in question is situated or from the date of execution of this Adreement, whichever is later**, excluding the grace period of Six (6) Months and Fit-Out Period of 3 (Three)Months upon Permissive Offer of Possession*

by the Developer, subject to all just exceptions and failure of other Allottee(s) to pay the instalments in time the Total Cost and all other charges mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement or delay/ ***failure due to Force Majeure conditions including but not limited to delay in approval of plans or any other departmental delays or due to any circumstance beyond the power and control of the Developer including but not confined to pendency of Litigation, then the Allottee(s) authorize the Developer to extend time for delivery of possession of the Apartment*** *and if the circumstances so warrant, the Developer may also suspend the development for such period as is considered expedient and* ***the Allottee(s) shall not have right to claim any sort of compensation during the period of suspension.***

11.2 Further, ***if the Developer is unable to construct/ continue or complete the construction of Apartment due to any Government/ regulatory authority's action, inaction or omission then the Developer may in its sole discretion challenge the same by moving the appropriate Courts. Tribunal(s) and/or Authority.*** *In such a situation, the Allottee(s) may join as an affected party in any suit/ complaint/ writ/ PIL filed before any appropriate court by the Developer/ Allottee(s) or any other third party, if the Developer's rights under this Agreement are likely to be affected/prejudice in any manner by the decision of the court on such suit/ complaint/ writ/ PIL. However,* ***during the subsistence/ continuance***

<u>of suit/ complaint/ writ/ PIL. the amount paid by the Allottee(s) shall remain with the Developer and the Allottee(s) shall not have a right to terminate this Agreement and ask for refund of his money and this agreement shall remain in abeyance till final decision/ Judgment by the Court(s) Tribunal(s)/ Authority(ies)</u>. *In the event the Developer succeeding in its challenge to the Impugned legislation or rule, regulation, order or notification as the case may be, it is hereby agreed that this Agreement shall stand revived and the Allottee(s) shall be liable to fulfill all their obligations as provided in this Agreement. It Is further agreed that in the event of the aforesaid challenge becomes final, absolute and binding, the Developer will, subject to provisions of law/ court order"*

From the above it is clear that Forty Eight (48) Months plus a grace period of 6 months is to be strictly computed from the date of receipt of all approvals/ Clearances/ Permissions etc. excluding Force Majeure conditions viz.

- *delay in approval of plans or*
- *any other departmental delays or*
- *due to any circumstance beyond the power and control of the Developer including but not confined to pendency of litigation,*

Thus by a binding contract [i.e. ATS] Allottee(s) authorized the Developer to extend time for delivery of possession of the Apartment in the given circumstances.

iii Petitioners have failed to disclose before this Hon'ble Tribunal the following chronology of events which give the true factual background:

DATES	PARTICULARS
2005	Group housing scheme in Haryana was notified by the Government of Haryana.
14.02.2007	S.K.G. Buildcon Pvt. Ltd. (Land Owner-I) & Ambition Colonizers Pvt. Ltd. (Land owner-II) Both the said companies acquired land situated in Dharuhera, Rewari District, Haryana for the purpose of development of a residential group housing project.
29.09.2009	The Land owner I & II companies jointly applied for grant of license with Director, Town & Country Planning, Haryana (hereinafter, 'DTCP') for setting up a Residential Group Housing Colony vide Letter dated 29.09.2009.
01.04.2012	The Land owner I & II companies entered into collaboration agreement dated 01.04.2012 with the Corporate Debtor for development of Residential Group Housing Colony on the land admeasuring 13.237 acres in the Revenue Estate of Village-Maheshwari, Sector-22, Tehsil Dharuhera, Dist. Rewari, Haryana.
31.10.2012	The DTCP granted Letter of Intent (hereinafter, 'LOI') vide LOI dated 31.10.2012 to Land Owner I & II company jointly for development of a residential group housing colony on land admeasuring 13.237 acres falling in the revenue estate of Village Maheshwari in residential Sector-22, Dharuhera, Rewari, Haryana. Letter of Intent dated 31.10.2012 in favour of M/s S.K.G. Buildcon Pvt. Ltd. and M/s Ambition Colonizers Pvt. Ltd. is annexed herewith as Annexure A-4
18.03.2013	The License being License No. 13/2013 was granted by DTCP to Land owner I & II companies to develop a Residential Group Housing Colony over land admeasuring 13.237 acres falling in the revenue estate of Village Maheshwari in residential Sector-22, Dharuhera, Rewari, Haryana. It is relevant to note that the license was valid for a period of four years i.e. up to 17.03.2017. True Copy of License No. 13/2013 dated 18.03.2013 in favour of M/s S.K.G. Buildcon Pvt. Ltd. and M/s

	Ambition Colonizers Pvt. Ltd. is annexed herewith as **Annexure A-5**
19.03.2013-15.04.2013	The Land owner companies and the Corporate Debtor applied for approval of Building plans vide Application dated 19.03.2013 and follow up letter dated 15.04.2013
16.04.2013	The DTCP granted approval of building plans of Group Housing Scheme measuring 13.237 acre in respect of license no. 13 of 2013 dated 18.3.2013. True Copy of Approval of Building Plans dated 16.04.2013 is annexed herewith as **Annexure A-6**
27.05.2013-	The Corporate Debtor made application dated 27.05.2013 to State Environment Impact Assessment Authority, Haryana seeking prior approval of Environment Clearance under EIA Notification, 2006.
28.02.2014	The State Environment Impact Assessment Authority, Haryana granted Environment Clearance dated 28.02.2014 to the Corporate Debtor for development of the project. True Copy of Environment Clearance dated 28.02.2014 under EIA Notification, 2006 is annexed herewith as **Annexure A-7**
29.04.2014	Certain modifications were proposed to be made in the project which led to submission of approval for revised building plans vide application dated 29.04.2014
14.07.2014	The DTCP approved revised building plan of Group Housing Scheme measuring 13.237 acre in respect of license no. 13 of 2013 dated 18.3.2013. The project name was changed from 'Aravali Greenville' to 'Case Romana' True Copy of approval of revised building plan dated 14.07.2014 is annexed herewith as **Annexure A-8**
10.09.2014	The Haryana State Pollution Control Board granted Consent to Establish (hereinafter, CTE) to the Corporate Debtor. True Copy of Consent to Establish dated 10.09.2014 is annexed herewith as **Annexure A-9**
Sep 2014-17.03.2017	The Corporate Debtor immediately upon receipt of the above permissions/ grants started work of the project and constructed the project well ahead in time till 17.03.2017. It is relevant to note that during this period, the Corporate Debtor also raised demands from allotees in the project, including the Financial Creditors herein, for payments of dues as per the Construction linked Plan however, various allotees defaulted in making payments.

Beginning of Force majeure for non-renewal of license by DTCP and domino effect on grant of RERA certificate	
17.02.2017	The Corporate Debtor applied for renewal of License No. 13/2013 on 17.02.2017 i.e. well in time as it was set to expire on 17.03.2017. True Copy of Letter dated 17.02.2017 for renewal of License is annexed herewith as **Annexure A-10**
17.03.2017	The License No. 13/2013 expired on 17.03.2017 and the same was not renewed by DTCP for want of unjustified amount of External Development Charges (hereafter, 'EDC').
March 2017-December 2017	The officials of Corporate Debtor paid visits to the office of DTCP and issued letters, for clearing out the issue of EDC and non-renewal of license and were told that show cause notices for want of EDC/ non-renewal of license have been sent on the address of the Corporate Debtor. True Copy of Letter dated 26.10.2017 from the Corporate Debtor to DTCP is annexed herewith as **Annexure A-11**
31.07.2017	Due to non-renewal of License by DTCP, the RERA registration applied by the Corporate Debtor on 31.07.2017, was not granted and the Allottees and the banks stopped making payments which adversely impacted the project as most of the allottees had purchased the apartment on instalment linked plans. The application for registration with RERA kept pending till long.
08.12.2017	The officials of Corporate Debtor again visited the office of DTCP and upon discussions with the officials of DTCP came to know that the show cause notices/ correspondences issued earlier were issued on wrong/ old addresses. On the same day, the Corporate Debtor wrote to DTCP that previous show cause notices/ communications were not received by the Corporate Debtor because the address/ email has not been updated by DTCP. The Corporate Debtor also provided previous intimation letter dated 31.01.2015 for change of address/ email along with Letter dated 08.12.2017. True Copy of Letter dated 08.12.2017 along with letter dated 31.01.2015 issued by Corporate Debtor is annexed herewith as **Annexure A-12**
08.12.2017	Upon receipt of the above letter dated 08.12.2017, DTCP handed over physical copy of show cause notice dated 08.12.2017 to the Corporate Debtor to appear

	on 11.12.2017 for hearing on the issue of non-renewal of license and EDC issue. True Copy of Show cause notice dated 08.12.2017 issued by DTCP is annexed herewith as Annexure A-13
11.12.2017	The hearing on 11.12.2017 was adjourned to 11.01.2018.
11.01.2018	The Corporate Debtor submitted reply dated 11.01.2018 to show cause notice to DTCP providing the information/ documents sought by the Department and also provided reference of orders passed by Hon'ble Punjab & Haryana High Court in CWP No 5835 of 2013 in "Balwan Singh vs State of Haryana" whereby, the Hon'ble Court had stayed the operation of Memo No. HUDA-CCF-Acctt-I-2011/24224 dated 14.07.2011 and held vide order 08.05.2013 that the stay will not be applicable on future license. In essence meaning, the Corporate Debtor is not liable to pay enhanced EDC as the license was issued on 18.03.2013 and the Memo No. HUDA-CCF-Acctt-I-2011/24224 dated 14.07.2011 was not applicable upon the Corporate Debtor in terms of the orders. True Copy of Reply to Show cause notice dated 11.01.2018 along with Order dated 19.03.2013 and Order dated 08.05.2013 is annexed herewith as Annexure A-14
16.02.2018	The Officials of Haryana Government in the file notings recorded the wrongdoings of the department while hearing on representation for the renewal of present and another license before the DTCP. The file notings concluded as below- *"I must express my apologies to developer in the wat we have dealt them during 2011-2016. While Mr. Rastogi had given relief, dept. was reluctant.* *Department officials acted like an indifferent and thuggish manner.* *Now that it is an old story, examine afresh holistically, considering all three cases in integrated manner"* True Copy of file notings dated 16.02.2018 are annexed herewith as Annexure A-15.
07.03.2018 & 12.03.2019	Upon persistent follow ups by the Corporate Debtor, DTCP issued comfort letter dated 07.03.2018 and 12.03.2019 stating merely "this is to inform that case for renewal of license is in advance stage of consideration.", however, did not renew the license.

	True Copy of Comfort Letter dated 07.03.2018 and 12.03.2019 issued by DTCP are annexed herewith as Annexure A-16
11.02.2019	DTCP vide Letter dated 11.02.2019 allowed downsizing of the project on land admeasuring 8.376 acres from 13.376 acres.
22.02.2019	The Corporate Debtor made representation to RERA requesting for grant of RERA and the same be not stalled due to procedural delays. True copy of representation by the Corporate Debtor to RERA dated 22.02.2019 along with representation dated 06.05.2019 is annexed herewith as Annexure A-17
09.05.2019	RERA authority while considering the application of the Corporate Debtor for grant of RERA registration vide order dated 09.05.2019 recorded all shortcomings in the process adopted by the government and the DTCP was advised to revisit their principles of granting/renewing a license etc. being a sovereign guarantee by the State Government and further directed to decide the application for renewal of license, status of approval of Service plan estimates and adjustment of EDC expeditiously and report on next date of hearing i.e. 19.08.2019. True Copy of RERA order dated 09.05.2019 is annexed herewith as Annexure A-18
21.05.2019	RERA license being Registration No. HRERA-PKL-RWR-105-2019 dated: 21.05.2019 was granted to Corporate Debtor. True Copy of RERA license being Registration No. HRERA-PKL-RWR-105-2019 dated: 21.05.2019 is annexed herewith as Annexure A-19
19.08.2019	DTP (HQ) appeared before HRERA on behalf of DTCP-H and gave an oral statement that it has no objection to the course adopted in Order dated 09.05.2019. The HRERA further allowed the CD to file a separate complaint on the issue of EDC if not resolved. Thus, the order dated 09.05.2019 was confirmed. However, even after the said order the license was not renewed. True Copy of RERA Order dated 19.08.2019 is annexed herewith as Annexure A-20
04.02.2020	In Feb 2020, being aggrieved by non-renewal of license and approval of Service Plan Estimates, the Corporate Debtor filed a complaint with HRERA being Complaint No. 144/2020 titled as *"Dwarkadhis Projects Pvt. Ltd. Vs. DTCP-H"* before RERA, Haryana.

	True Copy of proof of filing of RERA Complaint on 04.02.2020 is annexed herewith as Annexure A-21
29.09.2020	The HRERA in Complaint No. 144/2020 vide order dated 29.02.2020 observed that the project of the Corporate Debtor is suffering due to inaction on part of the department. the Court further observed, "In such situation, the Authority is of the view that Town and Country Planning Department could also be held responsible and liable to bear burden of interest and penalty leviable to be paid on account of delay in handing over the possession to the allottees." True Copy of Order dated 29.09.2020 passed in Complaint No. 144/2020 is annexed herewith as Annexure A-22
09.11.2021	The Complaint No. 144/2020 was disposed of vide order dated 09.11.2021 with the observation that Town and Country Planning Department will also be responsible for causing delay incompletion of the project if required permissions are delayed by them. It was further directed that in the event of failure of department to comply with the orders of this Authority further action will be taken for enforcement of these orders in the same manner as a decree of civil court. True Copy of Order dated 09.11.2021 passed in Complaint No. 144/2020 is annexed herewith as Annexure A-23
18.03.2021	That since 2017, the Corporate Debtor has given several representations to DTCH and Principal Secretary TCP Haryana (PSTCP-H). The PSTCP-H also duly heard the matter and vide orders dated 18.03.2021 in Appeal no. 09 of 2020 directed the DTCP to pass an appropriate order within a period of 8 weeks of receipt of the order however, the DTCP failed to take any action. True Copy of Order dated 18.03.2021 in Appeal no. 09 of 2020 by PSTCP-H is annexed herewith as Annexure A-24
Sep- Dec 2022	In Sep-dec 2022 DTCP-H finally did the audit/ recalculation of EDC and came to the conclusion that the Corporate Debtor had already paid an excess EDC of Rs. 1.5 Crores (Approx.) and hence there were no dues against the Corporate Debtor. True Copy of Schedule Report dated 09.12.2022 showing EDC of Rs. 1.5 Crores (Approx.) extra is annexed herewith as Annexure A-25
06.12.2022	Finally DTCP-H renewed the license of the Corporate Debtor with validity till 17.03.2024 however, the approval of Service Plan Estimates is still pending approval. True Copy of Renewed License dated 06.12.2022 is annexed herewith as Annexure A-26.
Dec 2012- July 2023	The Respondent upon receipt of the renewal of license has tirelessly worked to complete the project and three towers are also nearing completion. The architect's report also certifies the fact of construction work nearing completion. True Copy of Latest Pictures of the Project as on July 2023 are annexed herewith as Annexure A-27 True Copy of Architect's report dated 31.07.2023 is annexed herewith as Annexure A-28.

iv. *It is relevant to note that firstly, the alleged allotees/ Petitioners have camouflaged self-made and self-calculated 'period of default' instead of appreciating correct meaning of 'date of default'.*
This self-made and self-calculated 'period of default' is an alien concept under the Code.

Secondly, even if the submission of alleged allotees/ Petitioners is considered in respect of 'Date of default' then as well the petitioners cannot succeed as during the said period of 'alleged default', the 'Force Majeure events' in terms of the agreement to sell were in operation and that has the effect of extending the 'date of delivery' and if not delivered then the 'date of default'.

Therefore, the Application under Section 7 is filed without an actual default and at best is a premature petition.

v. *The Corporate Debtor is claiming the benefit of force majeure and consequently, extension of period of delivery of units to the Financial Creditors/ Homebuyers on the ground that various government permissions/ licenses/ grants/ registrations were not granted timely to the Corporate Debtor (without its fault) which led to delay in construction of the project as the said permissions are necessary for carrying on the construction and development work of the project.*

vi. ***Not a case of default and or any kind of conscious default****- Intent of the entire enactment/ Code clearly indicates that the default has to be a conscious default and cannot be a namesake default and or a default made out not from the acts of the developer. It is relevant to note that HRERA in a case titled as "**Nirmala Devi Chaudhary & Anr. Vs. M/s Jindal Realty Pvt. Ltd.,*

***Complaint No. 1048/2018**" held in similar circumstances that the Intervening period where the concerned authority has failed to act/ grant necessary approval that period has to be considered as a "Force majeure" period.*

*True copy of order dated 08.01.2019 in Nirmaia Devi Chaudhary & Anr. Vs. M/s Jindal Realty Pvt. Ltd., Complaint No. 1048/2018 is annexed herewith as **Annexure A-29.**"*

13. Referring to the proceeding before HRERA, the Corporate Debtor has tried to espouse that the Corporate Debtor has been making genuine efforts to complete the project and whatever lapse was there, the same was on the part of the department of Town and Country Planning. Para 6(c) of the reply reads thus: -

"6C. RELEVANT OBSERVATIONS IN THERE IS NO DEFAULT OF CD

Date of Order	Proceeding details	Observations made by RERA
09.05.2019	Application for grant of RERA registration Item No. 51.7: Extract of the resolution passed by the Haryana Real Estate Regulatory Authority, Panchkula in its meeting held on 09.05.2019	4 v) The Authority considers that in the absence of any objection from the Town and Country Planning Department against renewal of license, it should be presumed that their license will be renewed in due course of time. Non-renewal of license due to any technical reason like adjustment of EDC dues etc. should not come in the way of prolonging registration to the project. This otherwise, will create a vicious circle which eventually may jeopardize the entire project.... ...The allottees pay their hard money to the developers' licensed colony with duly approved plans on the basis of license granted and plans approved by the State Government. The licensed and approved plans thus attained the status of sovereign assurance of the State Government given to the general public that they may safely invest in the project and nothing will go wrong with this investment. This assurance given by the Town and Country Planning Department is a sovereign guarantee to the public. The sovereign assurance granted to the allottees by way of license and other approvals cannot be amended, altered or re-structured in any manner with retrospective effect or without appropriate Authority of the legislature. The grant of license and approval of plans becomes a commitment of the State Government to the allottees that they will get the apartment in terms of the agreement as per the approved plans. It also implies guarantee of the safety of their investment.

		(vii) **Now, after launching of the Project and creation of 3rd party interests, the license and the development plans becomes irrevocable. It is possible that some developers may become defaulters in payment of EDC, license fee etc. to the State Government. To enforce the payment of such over-dues, the State Government is entitled to adopt any lawful means available but it cannot implicitly or explicitly mean that the license of the sanctioned project would be withdrawn/withheld/ altered. In other words, the State Government is entitled to recover its over-dues by attaching any property of the developers or by filing civil suit or by attaching unsold or undeveloped portion of the project but the portion of the project in respect of which third party rights have been created that goes out of the powers of the State Government except for the purpose of granting occupation certificates at the relevant stage or for ensuring that development has been done in accordance with the approved plans, etc. Accordingly, the State Government cannot withhold renewal of license of a project in respect of which third party rights have been created. The Authority is of considered opinion that in the event of delay in renewal of license on the part of the State Government, the Authority cannot and should not withhold grant of registration because banks and financial institutions will not finance an apartment in a project which has not been registered with the Authority. Thus, a project which is otherwise being developed as per plans cannot denied registration if its delay is being caused in renewal of its license.**
19.08.2019	**Application for grant of RERA registration** **Item No. 64.7:Extract of the resolution passed by the Haryana Real Estate Regulatory Authority, Panchkula in its**	4. Keeping in view the written reply on behalf of the Director, Town and Country Planning and the oral statement of Shri Narinder Kumar, DTP (HQ), the order dated 09.05.2019 passed by this Authority is hereby confirmed. 5. The Authority, however, observes that in case the promoter files a complaint stating all the relevant facts relating to the alleged wrongful charging of the EDC IDC etc., the Authority may seek reply of the Director Town and Country Planning Department for resolving the dispute. The promoter is free to file an online complaint with the Authority in this regard.

	meeting held on 19.08.2019	
29.09.2020	**Complaint No. 144/2020** **Hearing: 3rd** **Matter: Dwarkadhis Projects Pvt. Ltd. Vs Department of Town and Country Planning Haryana through its Director**	**6 (iii) This project is at the advance stage of completion. Number of complaints has been received relating to the project citing the reasons of delay in completion. While on one hand allottees are suffering because they are not able to get their homes, on the other promoter is suffering because the project is getting delayed despite all efforts being made by the promoter. It has been observed by the Authority that the promoter has invested the considerable amount of money from his own pockets.** **7. In the light of above observations, the Town and Country Planning Department is directed to expedite the decision on the matter pending before them since long. They must realize that the project has been launched only after getting a license from the Town and Country Planning Department and also after due approval of their building plans etc. Now, after creation of the third party rights, department cannot refuse to renew the license. If any dispute has arisen for the reason of non-payment of EDC etc., the same can be resolved by other means but the department cannot bring development of the project to halt by non-renewal of the license.** **The Authority would ask a question that who will be liable for the period of delay in completion of the project, when the allottees are entitled to get delay interest and compensation for the period delay. Evidently, the project is suffering due to inaction on the part of the department. In such situation, the Authority is of the view that Town and Country Planning Department could also be held responsible and liable to bear burden of interest and penalty leviable to be paid on account of delay in handing over the possession to the allottees.**
09.11.2021	**Complaint No. 144/2020** **Hearing: 13th**	**4. Authority observes that Town and Country Planning department has still not renewed license of the complainant company resultantly allottees of the project are suffering badly. Therefore, Authority reiterates its view that Town and Country Planning Department will also be responsible for causing delay in completion of the**
	Matter: Dwarkadhis Projects Pvt. Ltd. Vs Department of Town and Country Planning Haryana through its Director	**project if required permissions are delayed by them** **5. In view of above, Authority disposes of this matter with a direction to Town and Country Planning department to dispose of all pending requests of promoters by passing a detailed speaking order as per law within 30 days. In the event of failure of department to comply with the orders of this Authority further action will be taken for enforcement of these orders in the same manner as a Decree of Civil Court.**

14. Relying upon the RERA Model Law/Rules, particularly the notification No. MISC-104-7(A)/ED(R)/196 dated 28.07.2017, issued by Government of Haryana which provide a model 'Agreement to Sell', applicable to all the projects in Haryana, the Corporate Debtor has pleaded that the Promoter/CD understand that the timely delivery of possession of Plot/Unit/Apartment for Residential/Commercial/Industrial/IT/any other usage (as the case may be) along with parking (if applicable) to the Allottee(s) and the common areas to the association of allottees or the competent authority, as the case may be, as provided under Rule 2(1)(f) of Rules, 2017, is the essence of the Agreement. It has been espoused in the reply that as a standard practice, the Promoter needs to assure to hand over possession of the Plot/Unit/Apartment for Residential/Commercial/Industrial/IT/ any other usage (as the case may be) along with parking (if applicable) as per agreed terms and conditions unless there is delay due to 'Force Majeure', Court orders, Government/policy/guidelines, decisions affecting the regular development of the real estate project. If, the completion of the Project is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Plot/Unit/Apartment for Residential/Commercial/Industrial/IT/any other usage (as the case may be).

15. The Corporate Debtor has emphasized that the non-grant of required permission by the authorities constitute 'Force Majeure event'. According to it, in terms of Clause 11.1, 11.2 & 47 of the Agreement to Sell/Builder buyer agreement(s) the period of 48 months stipulated for handing over the possession need to be reckoned from the date of all

approvals/clearances/permission necessary for the construction and development of the apartment or from the date of commencement of construction of the particular building/Tower/Block in which the Apartment in question is situated or form the date of execution of the Agreement whichever is later. To further buttress the plea that the inaction on the part of authorities in granting certain permission to the Corporate Debtor amounts to 'Force Majeure events', the Corporate Debtor has given a list of the steps required to be taken by the authorities regarding a building project. The table/list has been given in para 6E of the reply which reads thus: -

> *"**6E. INACTION IN GRANTING SERVICE PLAN ESTIMATES (SPE)-***
>
> *The application for SPE was made for the first time on 06.06.3013 and thereafter, various times till December 2022 but the same was never granted. Being aggrieved by non-grant of SPE, the Corporate Debtor even filed a complaint on 07.02.2023 in HRERA being complaint no. 276/2023 seeking grant of SPE. The said complaint was dismissed vide order dated 03.05.2023 on the ground that the Complaint is not maintainable as there is no provision under RERA to file a complaint seeking relief against an authority. The Corporate Debtor is in the process of initiating appropriate legal remedy seeking grant of SPE. It is also relevant to note that the Corporate Debtor sent repeated remined to concerned authorities for grant of SPE however, the same fell on deaf ears and sometimes the officials even asked for monetary favors which was duly communicated to Principal Secretary, Government of Haryana and the Vigilance Department specially vide email dated 21.07.2023. The pictures of the project as annexed above demonstrate that the project/ 3 towers are almost complete and the remaining work is*

pending for want of SPE approval. The Occupation Certificate for the said towers is also pending because of non-grant of SPE.

True Copy of Order dated 03.05.2023 passed by HRERA in complaint no. 276/2023 is annexed herewith as ***Annexure A-31.***

True Copy of Email dated 21.07.2023 from the Corporate Debtor to concerned authorities along with previous mails/ letter from 2020 are annexed herewith as ***Annexure A-32.****"*

16. To show its bona fide, the Corporate Debtor canvassed that the application for SPE (Service Plan Estimates) was made for the first time on 06.06.2013 and thereafter several times till December 2022, but the same was never granted. Being aggrieved by non-grant of SPE, the Corporate Debtor even filed a complaint on 07.02.2023 before HRERA viz. Complaint No. 276/2023 seeking grant of SPE. The complaint was dismissed vide order dated 03.05.2023 on the ground that the same was not maintainable as there was no provision under RERA to file the complaint seeking relief against an authority. According to the Corporate Debtor, it is in the process of initiating appropriate legal remedy seeking grant of SPE. It is also the case of the Corporate Debtor that it sent repeated reminders to the concerned authorities for grant of SPE, but the same fell in deaf ears and sometimes even the officials asked for monetary favors regarding which the report was made to Principal Secretary, Government of Haryana and its Vigilance Department specially vide email dated 21.07.2023. Referring to the pictures of the project, the Corporate Debtor submitted that the three towers are almost complete and the remaining work is pending for want of SPE approval.

17. To further explain the delay in completion of the project to espouse that the Corporate Debtor has not committed any default calling for action in terms of the provision of Section 7 of IBC, 2016, the Corporate Debtor has raised the pleas of inaction in approving the firefighting scheme and fire NOC and effect of COVID.

18. As can be seen from the plea raised in the reply, Section 15 of the Haryana Safety Act, 2009 required the builder to seek approval of firefighting scheme before the commencement of construction and the authority and the authority must issue a provisional 'No Objection Certificate' (NOC) within 60 days of submission of the application. In the present case, the approval for firefighting scheme and NOC were applied on 13.06.2013 and again on 30.09.2014, but neither the approval nor NOC was granted. In the absence of approval, the progress/construction of project suffered. It is the case of the CD that the COVID also resulted in delay of project, as the labourers associated with the construction work left and the supply chain was disrupted. Having referred to the pandemic COVID 2019, the Corporate Debtor has espoused that if COVID period is excluded, there is no default qua FC No. 21 (Dilip Das) and FC No. 57 (Rita Chawla). In para 6H of the reply, the Corporate Debtor had given the sequitur/consequences of non-availability of permission/NOC/approvals and interplay thereof. The para reads thus: -

> ***"6H. SEQUITUR/ CONSEQUENCE OF NOT PROVIDING PERMISSION/ NOC/ APPROVALS AND INTERPLAY THEREOF***

- ***Clause 32 of Environment clearance dated 28.02.2014*** *mandates that the builder shall develop civic infrastructure like internal roads, sewage line etc for which SPE approval is mandatory*
- ***Conditions to Consent to Establish*** *also mandate that before the construction to start the builder shall comply with all the conditions imposed under Environment Clearance.*
- ***Clause 19 of Environment Clearance dated 28.02.2014*** *mandates that the builder shall provide adequate fire safety measures as required under Haryana Fire Safety Act, 2009*
- ***Clause 4 of the Building Plan approval*** *mandates that no permission for occupancy can be issued if the builder did not provide adequate firefighting measures.*
- ***Clause 1 of the Building Plan approval*** *states that validity of building plan was for 5 years subject to the validity of license got infructuous on 17.03.2017 with the expiration of license and only came into effect on 06.12.2022 with the renewal of license*

As can be seen from above, the period of force majeure started on 17.03.2017 due to non-renewal of license and the same continues till date for want of approval of Service Plan estimates. During the said period, various other government licenses/ permissions were not granted/ renewed/ became in-operative which prevented the CD to carry on with the construction leading to delay in completion of project and handing over of the possession. That non grant/ renewal of above has led to delay in construction/ delivery of units and thus, no default can be attributed on part of the Corporate Debtor and the captioned petition is without any cause of action as no default has occurred on part of the CD. Moreover such a condition has been treated as a force Majeure situation as per

clause 11.1 and 11.2 of the bilateral ATS whereby the allottees had authorised the developer to extend time for delivery of possession and not to claim any sort of compensation during such period. The construction started only after obtaining CTE from Haryana State Pollution Control Board on 10.09.2014 and till the validity of License, the CD got only 2 years 6 months for construction. After the Renewal on 06.12.2022, the CD has again started the construction and 3 out of 8 towers have already been finished expeditiously however, the Services construction/ laying (Fire, Water, Sewer, Storm, Electricity, Roads etc.) still remains pending because of non-grant of Service Plan Estimates preventing the completion of the project. It is relevant to note that grant of permissions by the concerned authorities is a sine qua non for completion of the project. The Court cannot turn a blind eye to the facts of the case and punish the Corporate Debtor for no-default on its part. Furthermore, even the interpretation of the respective agreements between the Corporate Debtor and the Financial Creditors, the event of default will only occur when the Corporate Debtor fails to give possession in the promised time subject to approval by concerned authorities."

19. Relying upon the judgment of Hon'ble NCLAT in Pravesh Magoo Vs. Grace Realtech Private Limited, CA(AT)(I) No. 1141/2019, the Corporate Debtor has contended that the Adjudicating Authority need to see whether the delay is attributable to Corporate Debtor and in case the same is not attributed to it but is caused by 'Force Majeure event', it cannot be alleged that the Corporate Debtor defaulted in delivering the possession. The CD also placed reliance upon the judgment of Hon'ble NCLAT, passed in Navin Raheja v. Shilpa Jain [Company Appeal (AT) (Insolvency) No. 864 of 2019] to contend that the non-availability of necessary infrastructure facility required to be

provided by the Government for carrying to development activities such as outside water discharge system by HUDA or State Government need to be treated as 'Force Majeure event' and are to be accepted as plausible clause for delay, while deciding the issue of 'default'.

20. It is also the case of the Corporate Debtor that the filing of the present petition is an act of vengeance at the end of the Financial Creditors and two of the Petitioners namely Mr. Aditya Tyagi and Mrs. Kalpana Jain are using the present proceedings as a mechanism to settle scores for not awarding them the work in the project of Corporate Debtor as sought by them. The allegations made in the petition against Mr. Aditya Tyagi and Kalpana Jain in para 7B of the reply reads thus:-

> "**7B. Vengeance-** *Mr. Aditya Tyagi, also one of the authorized representatives in the captioned Petition, had previously signed a contract with M/s Exotic Buildcon Pvt. Ltd. (engaged in construction activity of Aravali Heights, earlier project of the Corporate Debtor) for providing installment of firefighting services/ equipment at the project site of Aravali Heights. The said person had expressed his willingness to continue with the current project of the Corporate Debtor however, the management decided not to give the said contract to Mr. Aditya Tyagi as the work quality was sub-standard and the Corporate Debtor had faced quality issues with respect to equipment installed/ supplied by Mr. Aditya Tyagi. The said person is also the perpetrator of joining allottees together to file the captioned Petition in order to cause harm to the Corporate Debtor and in effect force the Corporate Debtor into insolvency. Mrs. Kalpana Jain is also an alleged allottee in the captioned Petition and her husband, Mr. Manish Jain had on*

various occasions approached the Corporate Debtor for contract of firefighting services/ equipment at the project site. The above persons cannot be said to be bonafide allotees in terms of the Code as they are misusing the Code to their benefit to settle the scores with the Corporate Debtor/ management of Corporate Debtor."

21. The further plea raised on behalf of the CD is that the Petition suffers from suppressio veri suggesto falsi. It is contended by the CD that the suppression of any material document/facts amounts to a fraud which reminds of the pristine maxim-fraus et jus nunquam cohabitant i.e. fraud and justice never dwell together. The reply espouse that the Petitioners herein have been a party to various litigations with the CD before different forums, but they have not apprised this Adjudicating Authority about the same. Such plea is raised in para 7C of the reply, which reads thus:-

"**7C.** ***Suppression***- *That the petition under reply suffers from suggesto vari suppressio falsi. It Is a well settled law that suppression of any material document/facts amounts to a fraud, which reminds of the pristine maxim- fraus et jus nunquam cohabitant i.e. fraud and justice never dwell together.*

The Petitioners herein have been a party to various litigations with the CD before different forums. Despite being aware of the said facts, the Petitioners have not only failed to apprise this Hon'ble tribunal regarding the same but have actively concealed any such fact/ document from this Hon'ble Tribunal. Thus, it is clear that the intent of the Petitioners is not timely completion of project but to jump ship and really get back, by way of this coercive measure, monies already paid by it. The Hon'ble NCLAT in ***Navin Raheja Vs. Shilpa Jain***

and Others in Company Appeal (AT) (Insolvency) No. 864 of 2019

Following allottees have been to different forums-

Petitioner No.	Name of the allottee	Court/ Forum
FC 68	Sujeet Kumar Gupta	RERA
FC 01	Ashish Kumar	RERA
FC 08	Arun Vats	RERA
FC 25	Gautam Yadav	RERA
FC 72	Vaibhav Tyagi	RERA
FC 38	Manish Rana	RERA/ SDCDRC
FC 42	Monika Singh Nagpal	NCDRC/ PS Vasant Kunj
FC 18	Chand Singh	RERA
FC 05	Amber Prakash Rupesh	RERA/ SCDRC
FC 17	Birender Bhagat	RERA
FC 50	Pradeep Kumar Senapati	RERA/ SCDRC
FC 70	Sunil Piplani	NCDRC
FC 27	Hanuman Sharma	NCDRC
FC 47	Nigam Pallwal	NCDRC/ RERA/ PS DHR

It is also relevant to note that the above persons had sought refund in the earlier litigation rounds (not disclosed) and not initiation of insolvency thus, these alleged allottees cannot be termed as genuine allottees."

22. The Respondent has also questioned the calculation of the amount of default. The plea raised in Para 7E of the reply reads thus:-

"7E. CALCULATION OF ALLEGED 'AMOUNT OF DEFAULT' IS WHIMSICAL

i. The alleged Allottees have averred in the captioned Petition that an amount of ***Rs. 38,87,64,702 /-*** *is the total amount of financial debt which is inclusive of the Principal amount and the possession penalty as per Clause 15 of the Agreement to Sell. In order to appreciate the controversy, Clause 15 of the agreement to sell Is reproduced herein below-*

"...The Allottee(s) agrees that if the construction and development of the Project is abandoned or the Developer is unable to give possession, the Developer shall be entitled to terminate this Agreement whereupon the Developer's liability shall be limited to the refund of the amounts paid by the Allottee(s) without interest and the Developer shall not be liable to pay any sort of Compensation whatsoever. ***However, the Developer may, at its sole option and discretion, decide not to terminate this Agreement in which event the Developer agrees to pay onlv to the original Allottee(s) and not to anyone else and subject to Clauses 11.14 and 47 and the Allottee(s) not being in default of payment of any installment*** *and violation of any term and condition of this Agreement,* ***the Compensation @ Rs. 5/- per Sa. Ft of the Super Area of the Apartment per month for the period of such delay*** *beyond the period stipulated in Clause- 11 and 12 of this Agreement. The payment/adjustment of such compensation shall be done only at the time of payment of last installment by the Allottee(s) and not earlier."*

ii. *The above clause provides that in the event the Corporate Debtor s unable to give possession and the agreement is not terminated then the Corporate Debtor shall be liable to pay compensation @ Rs. 5/- per Sq. Ft. of the Super area of the unit subject to two conditions i.e. Clause 11 & 47 (force majeure) and no default in payment of installment by the said allottee.*

iii. *In the present case, the Financial Debt as shown in the Petition is wrong in as much as the Clause 15 will not apply as the allottees were in default in making payments of the installments and allotment of some allotees has also been cancelled on the same ground. Furthermore, as mentioned above the Corporate Debtor*

suffered from non-grant of relevant permissions/ grants by the concerned authorities and therefore, the force majeure conditions as specified in clause 11 and Clause 47 operated thus, no additional liability can be fastened upon the Corporate Debtor in terms of the Agreement(s).

iv. Amount of one of the alleged allottees at SN. 61 in Annexure-6 of the petition is mentioned as ***Rs. 4,09,88,375*** *i.e. Rs. Four Crores which is totally wrong."*

23. It is also the emphasis in the reply filed by the CD that the aim and object of the Court is to rehabilitate the insolvent company and is not to force the solvent companies into insolvency for the purpose of recovery. To buttress the plea, he relied upon the judgment of Hon'ble Supreme Court in **Vidarbha Industries Power Vs Axis Bank case and in State Bank of India v. Krishidhan Seeds Pvt. Ltd.**

24. The Corporate Debtor has also raised the plea of limitation. According to it, there is delay of 3-4 years in filing the petition. It has also given the chart analysing the period of limitation. The chart is enclosed as Annexure A-35 to the petition. Para 8B of the reply reads thus:-

*"**8B.** That the Petitioner has wrongly placed reliance on the judgment of Hon'ble Apex Court **in Re-cognizance for extension of Limitation in MA# 21/2022 in MA 665/ 2021 in SMW (C) No. 3/ 2020 vide order dated 10.01.2022**, since majority of the default dates do not fall within the said period from 15.03.2020 to 28.02.2022 [Admittedly]. For others, whose default date does fall within the said period, the Petitioner could have availed extension of 90 more days and not beyond. Thus, a Petition to be maintainable/ within limitation should have*

been filed on or before June 2022. Thus, the present Petition is liable to be dismissed on this ground alone."

25. Making reference to the judgment of Mumbai Bench of this Tribunal in CP (IB) No. 2529/MB/2019, titled "Nand Kishore vs. Marvel Landmark", the Corporate Debtor has pleaded that the petition being filed after expiry of three years from the date of default mentioned in the petition need to be rejected. The Respondent has also objected to the plea of continuing cause of action raised by the Petitioners. Para 8D of the reply reads thus:-

"**8D.** The alleged allottees have also averred in the *Petition that there is a continuing default on part of the Corporate Debtor and therefore, the captioned application is within the period of limitation. In this regard it is stated that plea of continuous cause of action may be available to allottees for filing complaints before RERA or consumer forums however, for filing a section 7 the Application has to be mandatorily filed within three years from the date when the right accrues. As per annexure 6 of the Petition, the limitation period to file a section 7 expired during the operation of Supreme Court Suo moto order and that extends the period of limitation till June 2022 and not beyond. The captioned petition being filed in March 2023 is thus, hopelessly time barred and the Petitioners cannot claim that there is a continuing default. [**Reliance: "Abhijit Jasrasaria Vs. JOP International Ltd., CA(AT)(I) No. 187/2021"**]*

*The Petitioners have also failed to bring complete set of Agreement to Sell executed between the Petitioners and the Corporate Debtor and the same are annexed herewith as **Annexure A-36**.*

In view of the factual and legal position enumerated in the present reply, this Hon'ble Tribunal, may, in the interest of Justice, dismiss the appeal with cost."

26. As can be seen from para 9 of the reply, the Corporate Debtor has also questioned the authority on behalf of Ashish Kumar Taneja and Sanjay Kumar Das, Hanish Batra, Mahavir Singh, Manish Sharma, Aditya Tyagi and Ashish Kumar in filing the present petition. Para 9 of the reply filed by the Corporate Debtor reads thus:-

"9. DEFECTIVE AUTHORITY:

Aditya Tyagi and Ashish Kumar are a busy body, who are speculative investors. CIRP has been invoked by these persons, fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. He is a speculative person and not a person who is genuinely interested in purchasing a fiat/ apartment. They are the one who want to Jump ship and is involved in making all possible efforts to make the project fail. These people have approached this Hon'ble Tribunal on behalf of some persons who have not given proper power of attorney to them.

Some glaring facts showcasing defects in authorization are as under-

i. Signatures of Mr. Ashish Kumar Taneja and Mr. Sanjay Kumar Das are forged sign in as much as the sign are superimposed on the alleged Authority Letter. (Page 309 & 362)

ii. Non-existent signature on alleged authority letter of Mr. Hanish Batra. (Page 325)

iii. *Mr. Mahavir Singh (Living in Australia) has authorized some Mr. Nitish Tehlan and not Mr. Aditya Tyagi or Mr. Ashish Taneja (Page 335-336)*

iv. *Mr Manish Sharma living and Canada and Mr. Raj Kumar Gupta living in Canada and USA respectively have not given proper authority as the alleged authority letter needs to be apostilled by the Embassy to have any legal validity in the eyes of law in India.*

v. *Further, the sign of Mr. Aditya Tyagi and Mr. Ashish Kumar are forged in as much as they are super imposed on each and every alleged Authority Letter and not valid in the eyes of the law."*

27. In the rejoinder filed by them, the Petitioners have espoused thus: -

I. The plea raised by the Respondent regarding cancellation of allotment of 12 units is false and misleading. The purported cancellation letters were never delivered to the 12 allottees and the fact is established from absence of proof of delivery, which ought to have been enclosed with the reply. The contention raised by the Respondents regarding cancellation of allotment of 12 units is also falsified from the fact that the Respondent has constantly been issuing invitation letter to the allottees of the units, inviting them to the meetings organised for discussion qua the project, proving that the 12 allottees are still the allottees and the cancellation letters are a mere tactic to mislead this Tribunal.

II. It is the stand of the Corporate Debtor that no development work was caried in the project from March 2017 till December 2023, thus the Respondent was not entitled to raise any demand for payment towards such development from the allotees, and the nonpayment during the period could not be a ground to cancel the allotment.

III. From the fact that no refund had been made by the Respondent to 12 of the Petitioners it is unequivocally established that the contention raised by the Respondent that the allotment was cancelled is falsified and it is established that it was just a malafide attempt to mislead this Tribunal.

IV. The Section 7 of the Code provides for a threshold of 100 or 10% of the total number of allotee. As the total number of allotees is 737, the present petition preferred on behalf of 78 allotees and in respect of 79 units satisfy the requirement of threshold limit.

V. The plea of Force Majeure raised on behalf of the Corporate Debtor is misconceived.

28. To buttress the plea that the contention of Force Majure raised on behalf of the CD is misconceived the Applicants referred to Section 56 of Indian Contract Act, 1872. Para 10 of the Rejoinder, wherein Section 56 of the Indian Contract Act is reproduced reads thus:-

> *"10. The Petitioners vehemently deny the contention, rather:*
>
> *a. the Doctrine of Force Majeure is embodied in Section 56 of the Indian contract Act, 1872, which states that:*
>
> *"…**Contract to do act afterwards becoming impossible or unlawful –** A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful…."*
>
> *The above provision makes it clear that a contract becomes void when performance of the act becomes impossible or*

unlawful. It is submitted that in the current scenario, performance of obligations under the agreement did not become impossible, or unlawful – if it did, the Respondent has failed to establish such cause in its reply – and, accordingly, there is no frustration of contract between the Petitioners and the Respondent.

b. *Without prejudice to the Petitioner's submissions above, it is also submitted that the Respondent's contention is misconceived as the Respondent has failed to appreciate a well settled principle of law, that, relief on the grounds of Force Majeure events is not just for one party but for all parties to the contract and in circumstances of a Force Majeure event, none of the parties are obliged to perform their obligations. Therefore, if the Respondent is claiming relief for Force Majeure events, it shall not hold the allottees accountable for payment of instalments during the period of occurrence of such Force Majeure event and therefore, any cancelation on account of non-payment of instalments during the said period shall not stand.*

c. *Finally, the Respondent has never notified the occurrence of any force majeure events to the Petitioners, and whereas a party is required to inform the counterparty as soon as practicable when its ability to perform a contract is interdicted by such an event, the lack of any such intimation itself falsifies the Respondent's contention."*

29. While meeting the pleas raised in different paras of the replies, the Applicants pleaded in their Rejoinder that: -

a. The reliance placed by the Corporate Debtor on the Judgement in "Parvesh Mago Vs Ireo Grace Realtech Pvt. Ltd. is misplaced, as in the

present proceedings, the Applicants are not seeking any recovery but are seeking to put the Corporate Debtor back on its feet.

b. The purported letters cancelling the allotment of unit to 12 allotees was fabricated and anti-dated. The letters were never delivered to the Petitioner, as no proof of delivery is adduced before this Tribunal.

c. In terms of the order dated 11.02.2020, passed by the Authority (RERA), the date of completion of the project was 31.03.2021, but even after expiry of 2 years from the said date, the project is not complete.

d. As per the case of the Respondents, themselves, the date of default is 31.03.2021.

e. If the plea of Force Majeure is taken, the same would be equally applicable to both the parties to the Contract and one of the parties to the Contract cannot blame the other party for its lapse, while seeking shelter of Force Majeure for its all failure to perform the contract.

f. The Corporate Debtor never notified the concept of Force Majeure to Applicants/Petitioners.

g. The Architect's report dated 31.07.2023 indicates that the project is nowhere near to the completion. Further the certificate issued by registered engineer available on HRERA website indicates that no infrastructure was ever carried out as the service estimate plans are still pending. The status clearly states that no work in respect of the reads, sewerage system, storm water drainage system, water supply

has been carried out and a mere 12% of work is completed in respect of electricity supply.

h. In view of the Judgement of Hon'ble NCDRC given in Shamshul Hoda Khan Vs IREO Victory Valley Pvt. Ltd. (2019 SCC OnLine NCDRC 187), the fire NOC was not a precondition for commencement of the construction work.

i. The CD cannot take the shelter of COVID, as the default was committed before the dawn of pandemic.

j. The reliance placed on the Jugdment of Hon'ble NCLAT in Navin Raheja Vs Shilpa Jain & Ors [2020] 142 NCLAT is misplaced, as in the said case the CD had offered timely possession of the unit to the allotees and these were the allotees who refused to accept it, while in the present case the possession has not been offered.

k. In view of the law laid down by the Hon'ble Supreme Court, in Pioneer Urban Land & Infrastructure Ltd. Vs Union of Inda [2019 SCC OnLine SC 1005], the home buyers can resort to the remedies available to them before Consumer Forum, RERA and this Tribunal simultaneously.

l. The Petitioners namely Mr. Aditya Tyagi and Mrs. Kalpana Jain meets the criteria to be classified as allotees in terms of the provisions of Section 2(d) of RERA and their grievance is regarding non delivery of possession the units to them.

m. In view of the law declared by Hon'ble Supreme Court in Innoventive Industries Ltd. Vs ICICI BANK & ANR., Civil Appeal Nos. 8337-8338

OF 2017, the Adjudicating Authority has to determine only whether a default has occurred and whether the debt (which may still be disputed (was due and remained unpaid. If the Adjudicating Authority is of the opinion that a default has occurred, it has to admit the Application unless it is incomplete.

n. The Respondent is making contradictory statements that the Petition is barred by Limitation and is pre mature at the same time.

o. In case of a hundred allottees where the date of default is different, the default qua required sum of Rs. 1 Crore may be towards such Financial Creditor, who has not joined even an Applicant. An application would still lie, even when the debt is barred as against some of the Financial Creditors, who are Applicants, whereas the Application by some others, or even one who have moved jointly, fulfil the requirement of default, both in terms of the sum and in not being time barred. Hence the Application is not time barred, since the requirement of default, both in terms of sum and it not being barred by limitation is fulfilled collectively on account of several applicants, including- Mr. Dilp Das, Ms. Rita Chawala and Mr. Sushil Tanwar.

p. The Authorized Representatives are not the speculative investors, rather both of them meet the criteria to be classified as allotees under Section 2(d) of RERA and the said allottees are aggrieved by the failure of the Respondent to deliver the possession of their respective units.

q. All the Authority letters were properly executed and it was only due to inadvertent mistake that the Authority letters of Mr. Manish Batra and Mr. Nitish Tehlan are defective and the defects were cured by way of fresh Authority Letters executed in favor of Mr. Aditya Tyagi and M. Ashish Kumar. (The Affidavits executed by Mr. Manish Batra and Mr. Nitish Tehlan declaring that they intended to execute proper Authority Letters along with cured Authority Letters were enclosed as Annexure A-5 to the Rejoinder). The Authority letters executed by Mr. Manish Sharma and Mr. Raj Kumar Guta were executed in India.

30. The Financial Creditors filed their Written Arguments, espousing therein that –

i. There are multiple dates between 2017 to 2022, when the Corporate Debtor committed default in handing over the possession of the allotted units to the Petitioners and the latest date of default is 31.10.2022. Each Financial Creditor was issued allotment letter and Agreement to sell duly signed by the Corporate Debtor, was executed. The Corporate Debtor contracted to construct the units and deliver the possession of flats to the home buyers within 48 months from Agreement to Sell as stipulated in Clause 11 of the Agreement.

ii. The present Petition is within prescribed period of Limitation. When the dates of default qua each allotee given in Annexure A-6 to the Petition are different, in respect of few of them regarding whom the limitation is computed within 3 years prior to the date of filing of the present petition. In terms of the Judgement of Hon'ble Supreme Court

in Manish Kumar v. Union of India & Anr., (2021) 5 SCC 1 @ Para 159 and Paras 170-175, a Petition shall be maintainable qua all the petitioners when it is within limitation qua one of the Financial Creditors. The Petition was initially filed on 16.11.2022 vide CP no. 881/2022 and was allowed to be withdrawn in terms of the order dated 01.01.2023, with a liberty to file fresh one. Besides if the date 16.11.2022 on which C.P No. 881/2022 is treated as the date of filing, the Petition would be within limitation in respect of several Creditors.

iii. If the date of completion of project and possession as mentioned in Registration of Project with RERA is to be accepted viz. the possession of 4 units was to be given on the date of completion stipulated in the registration with RERA, irrespective of the dates mentioned in allotment letters/ATS, the final revised date of completion- after giving benefit of COVID period would be 31.01.2021. In such situations the claim of all the Petitioners would be within Limitation as per Article 137 of the Limitation Act, 1963.

iv. The CD is not correct in espousing that the Petition is hit by second proviso to Section 7(1) of IBC, 2016. The units allotted to 12 allottees in the present Petition were cancelled on 29.09.2021. The units were purportedly cancelled by a means of a cancellation letter placed on record without there being any proof of delivery of the same to the allottees. Even when the petitioners have denied receipt of the cancellation letters, the Corporate Debtor has not placed any tracking reports, proving delivery, on the record. The speed-post receipt placed

with the letters reveals that the complete address of the recipient was not mentioned, while posting the letters. The purported cancellation letters are merely self-serving, and have no evidentiary value when not accompanied by a tracking report. It is pertinent to note that all purported cancellation letters were issued on 29.09.2021, i.e., after the date of default as claimed by each of the 12 allottees in the present petition. The claim of corporate debtors regarding cancellation letter is false and misleading. Further, no refunds have been processed pursuant to any such cancellations.

v. The Authority under RERA, vide its order dated 11.02.2020, directed that the refunds might be processed after completion of the project. The Corporate Debtor misled this Tribunal while failing to point out that the order was applicable only to 4 Complaints who were claiming refunds and arrayed at Sr. No. 17 to 21 in the RERA Complaint – neither of whom are the Petitioners herein. Therefore, the said order is clearly not applicable to any purported cancellations made by the Corporate Debtor in respect of the 12 Petitioning Creditors as alleged in the Reply.

vi. The order passed by RERA is only an interim order subject to final orders to be passed only after receipt of responses from the respondents in a batch of complaints filed by the Corporate Debtor – viz. lead Complaint No. 2127 of 2019. The Corporate Debtor has concealed the complete record of the proceedings from this Hon'ble Tribunal by not placing the final judgement of the Authority, dated

07.07.2021, where the Corporate Debtor (Complainant) sought leave to withdraw the complaints (Sr. No. 1 to 16), in view of the fact that the Corporate Debtor's license had already lapsed. Therefore, any reliance on the said order by the Corporate Debtor is clearly malicious.

vii. The purported cancellation letters are dated 29.09.2021, viz. of a date, after the date of the order dated 07.07.2021. The Authority under RERA had held that the Corporate Debtor could not legitimately force allottees to pay when it was not in a position to complete the project.

viii. The retracting of the Corporate Debtor from its position as to the cancellation of unit allotted to Shri. Bhagirath Bhardwaj (one of the Petitioning Creditors herein) itself stands testimony of the falsehood in the Corporate Debtor's claim of cancellation of units. The Corporate Debtor, vide its letter to Shri Bhardwaj (who contacted the Corporate Debtor on perusal of their reply in the present petition where a cancellation letter addressed to him was included), dated 29.08.2023, makes an admission of having committed a mistake in failing to have taken into consideration payments indeed made by him.

ix. Corporate Debtor has falsely submitted that it has completed 70% of the construction work in the project and shall be in a position to complete and deliver the possession of the flats by March 2024. The Corporate Debtor has placed a table as Annexure A1 (@ Pg. 35) of its reply to canvass the status of the respective tower work as complete including finishing work which purportedly started in 2016-2017. An Architect's certificate, dated 31.07.2023, filed by the Corporate Debtor

as Annexure A28 @ Pg. 174 of the Reply manifestly establishes that it is only the work related to Towers L, M, N, P, R, S, H, J, K, T and U that is 70% complete. All non-tower related work (including basements) which shall include all common facilities is only complete to the extent of 53%. Therefore, on the whole the project is only complete to the extent of c. 60% despite having started construction in 2014. It is submitted that it is highly improbable that the Corporate Debtor would complete the remaining 40% in 3 months despite having taken 10 years to complete 60% thus far.

x. Out of 12 categories mentioned in the certificate, the Corporate Debtor has only completed work in respect of 3 such categories for tower related work and only 1 such category in non-tower related work. It is submitted that no milestones (other than earth work, back filling and concrete work) have been met, rather, only negligible finishing work has been done. This itself conclusively establishes that the Corporate Debtor has not managed to achieve any milestone with respect to construction work. Item 12 on the list, which provides a measurement of the finishing work, purportedly having started in 2016, manifestly provides that only 2.3% of the work in respect of the towers is complete, and none whatsoever in respect of finishing work in respect of non-tower was done as on the date of the certificate.

31. By filing the written submissions, the corporate debtor/respondent espoused/reiterated that: -

I. In terms of the second proviso to section 7(1) of the code, the petition is not maintainable as the number of Petitioners joined the Petition are not 10% of the total numbers of allotees in the project.

II. The date of default is mechanically arrived at by counting 48 months from the date of ATS, which is not correct. The period 0f 48 months need to be computed from the date of receipt of all approvals/clearances/permission necessary for the construction and development of the apartment or from the date of commencement of construction of the particular Building/Tower/Block in the which the apartment in question is situated or from the date of execution of the Agreement whichever is later, excluding the grace period of six months and fit-out period of three months upon Permissive Offer of Possession by the Developer, subject to all just exceptions and failure of other Allottee(s) to pay the instalments in time the Total Cost and all other charges mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement or delay/**failure due to Force Majeure conditions including but not limited to delay n approval of plans or any other departmental delays or due to any circumstance beyond the power and control of the Developer including but not confined to pendency of litigation, then the Allottee(s) authorize the developer to extent time for delivery of possession of the Apartment** and

if the circumstances so warrant, the Developer may also suspend the development for such period as is considered expedient and **the Allottee(s) shall not have right to claim any sort of compensation during the period of suspension.**

III. The Corporate Debtor had 57 months' time from the date of approval/permission by the authorities, subject to exclusion of period and the Force Majeure. Since, the license by DTCP issued on 18.03.2023 became due for renewal on 17.03.2017 was renewed on 06.12.2022, the period from 17.03.2017 to 06.12.2022 need to be excluded from the period within which the possession of the unit was to be given.

32. We heard the counsels for the parties and perused the record. As far as the issue of default is concerned, a reference needs to be made to the Agreement to Sell, as emphasis by the Corporate Debtor is on clause 11 of the ATS. According to him, in terms of the ATS, the period of 48 months for handing over the possession of the flat/unit could start running from the date of receipt of all approvals/clearances/permission necessary for the construction and development of the apartment or from the date of commencement of construction of the particular building/tower/block in which the apartment in question is situated or from the date of execution of the agreement whichever is later, excluding the grace period of Six months and Fit-out period of Three months upon Permissive Offer of Possession by the Developer, subject to all just exceptions and failure of other Allottee(s) to pay the installments in time the Total Cost and all other charges mentioned

in this Agreement and any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement or delay/failure due to Force Majeure conditions including but not limited to delay in approval of plans or any other departmental delays or due to any circumstance beyond the power and control of the Developer including but not confined to pendency of litigation, then the Allottee(s) authorize the Developer to extend time for delivery of possession of the Apartment. According to him, since, the license granted by DTCP on 18.03.2013 for a period of four years i.e. still 17.03.217 could be renewed only on 06.12.2022, the period of four years should be counted from the said date and the Corporate Debtor cannot be said to have committed any default qua handing over the possession of flats to allottee(s) till expiry of four years from 06.12.2022 plus 09 months grace period. It is also the plea raised on behalf of the Corporate Debtor that after renewal of the license, revised demarcation/zoning had been granted in July and on 04.08.2023 and electric plan/SLD had been approved on 18.09.2023. It is also the submission of the CD that the Water Assurance by HSVP was granted by HSVP on 19.12.2023. If the contention of the Corporate Debtor is accepted, there would be no default till 18.09.2028. When, it is the plea of the Corporate Debtor that no default in handing over the possession of the unit has yet been committed by it, it is also the contention raised by it that the petition is time barred. Para 8(A) to 8(D) of the reply reads thus:-

> ***"8A.*** *When the records (More specifically Annexure 6) provided by the Petitioners are considered, it becomes evident that majority of the claims of the Petitioners are time barred claims admittedly and thus are not entitled to maintain the present petition under reply. The petitioners have failed to establish any*

reason for approaching this Hon'ble Tribunal at this belated stage i.e. approx.. 3-4 years from the date when right to apply accrued as per records of the Petitioners respectively. Therefore the claim is time barred under Article 137 of the Limitation Act, 1963.

True Copy of a chart depicting Detailed analysis of Limitation period of each Petitioner Is annexed herewith as ***Annexure-A35.***

8B. *That the Petitioner has wrongly placed reliance on the judgment of Hon'ble Apex Court* ***In Re-cognizance for extension of Limitation in MA# 21/ 2022 in MA 665/ 2021 in SMW (C) No. 3/ 2020 vide order dated 10.01.2022****, since majority of the default dates do not fall within the said period from 15.03.2020 to 28.02.2022 [Admittedly]. For others, whose default date does fall within the said period, the Petitioner could have availed extension of 90 more days and not beyond. Thus, a Petition to be maintainable/ within limitation should have been filed on or before June 2022. Thus, the present Petition is liable to be dismissed on this ground alone.*

8C. *In a homebuyers matter before NCL, Mumbai in CP (IB) No. 2529/ MB/ 2019, titled* ***"Nand Kishore vs. Marvel Landmark"****, the Tribunal observed as under:*

> *"The contention of the Corporate Debtor that the Petition is hit by Law of Limitation has to be accepted in view of the fact that the date of the default mentioned in the Petition is 01.04.2014, but this petition was filed on 03.07.2019, which is more than three years after the date of default. It is beneficial to refer the judgments of the Hon'ble Supreme Court on limitation in insolvency & Bankruptcy Petitions, viz. B.K. Education Services Pvt. Ltd. vs. Parag Gupta & Associates, Vashdeo R Bhujwani v. Abhyudaya Co-operative Bank Ltd. & Anr. And Sagar Sharma vs. Phoenix ARC Limited,*

wherein it was held that Article 137 of the Limitation Act will apply to the proceedings wherein three years is the limitation period. Hence, the Petition is liable to be dismissed as hit by limitation."

[It is pertinent to note that the above submission is without prejudice to the submission i.e. the present being premature owning to the laxative attitude of the authorities in renewal of requisite licenses.]

8D. *The alleged allottees have also averred in the Petition that there is a continuing default on part of the Corporate Debtor and therefore, the captioned application is within the period of limitation. In this regard it is stated that plea of continuous cause of action may be available to allottees for filing complaints before RERA or consumer forums however, for filing a section 7 the Application has to be mandatorily filed within three years from the date when the right accrues. As per annexure 6 of the Petition, the limitation period to file a section 7 expired during the operation of Supreme Court Suo moto order and that extends the period of limitation till June 2022 and not beyond. The captioned petition being filed in March 2023 is thus, hopelessly time barred and the Petitioners cannot claim that there is a continuing default.* ***[Reliance: "Abhijit Jasrasaria Vs. JOP International Ltd., CA(AT)(I) No. 187/2021"]***

The Petitioners have also failed to bring complete set of Agreement to Sell executed between the Petitioners and the Corporate Debtor and the same are annexed herewith as ***Annexure A-36.***

In view of the factual and legal position enumerated in the present reply, this Hon'ble Tribunal, may, in the interest of Justice, dismiss the appeal with cost."

33. Thus, when according to Corporate Debtor itself, the petition is filed after delay of 3 to 4 years, the contention raised by it that no default for filing the present petition has occurred is falsified. It is quite weird that when in para 6B of the reply, the Corporate Debtor could raise the plea that the petition is premature, in paras 8A to 8D, it has espoused that the petition is time barred.

34. Though, the self-contradictory averments (supra) made in the reply do not inspire any confidence in the stand taken by the Corporate Debtor but still we would like to examine the plea of non-existence of default, raised by the Corporate Debtor, independently. It is not in dispute that the ATS were executed between 2014 to 2016. In terms of ATS, the Corporate Debtor had 57 months' time to deliver the possession. If we count, the period of 57 months' even from end of 2016, the period expired in September 2021. The present petition is preferred on 16.03.2023 after expiry of one and half year from September 2021. As far as the plea with reference to clause 11.1 of Agreement is concerned, it is the case of Corporate Debtor itself that the DTCP granted license on 18.03.2013, thus there is no explanation that how even after 10 years of grant of license the project was not complete in all respects and the possession was not given to the Allottee(s). As far as the judgment of Hon'ble NCLAT in Parvesh Magoo is concerned, in the said case, the facts of the case were entirely different. As can be seen from para 4 and 5 of the judgment, the application for occupancy certificate was submitted on 05.07.2018 and the occupancy certificate was received on 31.05.2019. It was after submission of application for Occupancy Certification that the e-mail for termination was written on 08.12.2018. In the said case, an e-mail

was written to the Financial Creditor that the apartment was ready for possession. Paras 6 to 8 of the order reads thus:-

> *"6. The Respondent – Corporate Debtor further contends that the letter was sent to the Appellant/financial creditor, stating that Apartment No. CDA6-02-203, Type 3 BHK, Floor-2, Tower A-6, The Corridors, Sector – 67A, Dhumaspur, Gurgaon is ready for possession. In the circumstances, the Adjudicating Authority has held that the Corporate Debtor has not committed any default. Therefore the Application for Initiation of CIRP has been rejected by the Impugned Order.*
>
> *7. The Respondent further contends that the Petition, filed under Section 7 of the I&B Code, is only to harass the corporate debtor and to extract a huge amount of money. As per Clause 13.3 of the Apartment Buyers Agreement (from now on referred to as "the Agreement"). The Respondent had fulfilled its obligation in applying for the "Occupational Certificate" within the time frame and had even offered possession to the Appellant within the stipulated time. It is further contended that the Respondent had completed construction of 1356 Apartments (approximately out of which 700 Apartments in Tower A6 to A10, B1 to B4, C3 to C7, EWS, convenient shopping, two-level basement are ready to move in, and Occupational Certificate for the same has been obtained on 31st May 2019. The notice of possession was given to the Applicant on 14th June 2019, and the possession of units have been offered to 381 allottees, out of which 62 allottees have already taken possession, and some of the allottees are also residing in the said group housing society.*
>
> *8. The Respondent further contends that as per Section 3(12) of the I&B Code, no debt was ever due and payable as per Section 3(11) of the I&B Code. Given the 'Agreement' dated 3rd June 2014, allottees had agreed that the offer for possession for the concerned apartment in terms of provisions of Clause 13.3, 13.4, and 13.5 of Agreement.*

The date of the offer for possession about a unit of the apartment depended on the approval of the building plan, and fulfilment of the conditions imposed by the said approval. Accordingly, the Respondent undertook to handover the possession of the apartment within the stipulated period of 60 months, i.e. 42 months commitment period plus six months "Grace Period" and six months extended "delay period" from the date of approval of plan and fulfilment of the preconditions imposed thereunder."

35. As can be seen from the order passed by Hon'ble NCLAT (supra), in the said case, the order was passed by the NCLT before amendment in IBC, 2016, in terms of which the condition of the application being joined by 10% or 100 of the allottees was introduced. Thus, Hon'ble NCLAT placed reliance on its judgment in Company Appeal (AT) (Insolvency) No. 864/2019, in **Navin Raheja vs. Shilpa Jain & Ors.** Para 11 of the judgment of Hon'ble NCLAT reads thus:-

"11. Further, the 'Corporate Debtor' stated that as far as the processing of its application for obtaining an Occupation Certificate was concerned, the same was under the control of the concerned Government/Competent Authority and any delay on account of the actions inactions and omissions on the part of the Government/ or Authority it was beyond the reasonable control of the 'Corporate Debtor'/Promoter. In the circumstances, in terms of Clause 4.2 of the Flat Buyer's Agreement a 'force majeure' condition will be applicable.

36. Besides, in the case of Parvesh Magoo (ibid), when the Corporate Debtor was ready to handover the possession, the sole Petitioner was asking for refund. Once, the CD was ready to give possession, of course, the NCLT

was magnanimous to take a view that the object of the IBC, 2016, was not to ignore the stand taken by CD. Para 2 of the order reads thus:-

"2. Brief facts of the case are as follows:

The Applicant/Appellant being a Financial Creditor made a booking of a unit, No. 203 in Tower No. A6, having a super area of 1726.91 sq. ft., in the Real Estate project, being developed by the Respondent under the name of "The Corridors" situated at Sector 67A, Gurgaon, Haryana. The Respondent after collecting Rs.17,00,000/- (Rupees Seventeen Lacs Only) from the Appellant issued an Allotment Letter dated 07th August 2013 and subsequently after a delay of almost a year executed an 'Apartment Buyer's Agreement' on 03rd June 2014. As per the Clause 13.3 of the terms of Agreement, the Respondent was to deliver the possession of the unit by July 2017 (i.e. 42 months from the date of approval of building plans), which the Respondent had grossly failed to deliver. Despite assurances to deliver possession by July 2017 the Respondent, failed to fulfil its obligation within the stipulated time. Thus the Appellant claimed refund of the amount as paid by them along with interest, till the date of refund. The Appellant, as per terms of the agreement, made prompt payment of all the instalments, as and when demanded by the Respondent. The Appellant adhered to the payment schedule and paid a total sum of Rs.1,59,29,016/- (Rupees One Crore Fifty Nine Lacs Twenty Nine Thousand and Sixteen only) to the Respondent and despite receiving timely payments failed to deliver the possession of the allotted unit. Thus the Appellant/Financial Creditor terminated the Agreement vide e-mail dated 08th December 2018 and sought a refund of the total amount already paid, along with interest, which she was legally entitled to as per the Agreement. The Appellant contends that the Respondent corporate debtor owes Rs.2,07,57,385/- (Rupees Two Crores Seven Lacs Fifty Seven Thousand Three Hundred and Eighty-Five only) as financial debt.

Therefore, Applicant/Financial Creditor filed an Application under Section 7 of the I&B Code for initiation of the Corporate Insolvency Resolution Process (in short 'CIRP'), which was rejected by the Impugned Order.

The Appeal has been filed mainly on the ground as under:

(a) The Adjudicating Authority, while rejecting the Application has ignored the fact that the default occurred on 10th July 2017 and the project, i.e. being developed by the Respondent, is still incomplete.

(b) The Adjudicating Authority, while rejecting the Application has completely overlooked the well-settled Principle of Law as laid down by Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan in Civil Appeal No. 12238 of 2018 that a homebuyer cannot be made to wait for years after the due date of possession and the homebuyer cannot be forced to take possession of the allotted unit if the real estate developer has completely failed to construct the project within the promised period.

(c) The Adjudicating Authority has completely ignored the settled Principle of Law laid down by the National Consumer Disputes Redressal Commission in the case of Abhishek Khanna Vs. Ireo Grace Realtech Private Limited in Consumer Complaint No.38 of 2017.

(d) The decision of the Adjudicating Authority that default has not occurred on the part of the Respondent is erroneous.

(e) The Adjudicating Authority has ignored the fact that the possession was due in July 2017. The purpose of the Builder Buyer Agreement got completely frustrated due to delay in delivery of possession.

(f) The finding of the Adjudicating Authority that the Appellant had terminated the said Agreement dated 08th December 2018, when the Respondent had not even received the Occupation Certificate, is erroneous."

37. Unfortunately, the situation in the present case is that the Corporate Debtor itself has taken the plea that the default was committed 3-4 years ago and the petition is time barred. Thus, we are unable to extend the benefit of judgment of Hon'ble NCLAT in Parvesh Magoo (supra) to the CD. As has been ruled by Hon'ble Supreme Court in **Collector of Central Excise Calcutta vs. M/s Alnoori Tobacco Products and Anr.,** [Civil Appeal- 4502-4503 of 1998] passed on 21.07.2004, the court should not place reliance on decisions, without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. The relevant excerpt of the judgment reads thus:-

"11. *Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark on lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed : (All ER p. 14 C-D)*

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."

12. *In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] Lord Reid said (All ER p. 297g-h), "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed:"One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." And, in British Railways Board v. Herrington [(1972) 1 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said : (All ER p. 761c)*

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

13. *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*

14. *The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus : (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)*

"19. ... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo)

by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

* * *

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

38. We could be comfortable in still dismissing the petition, if the CD could offer the possession of the dwelling units to the Petitioners. Nevertheless, the CD raised all possible contentions to defy the claim of the Petitioners. The CD could not even avoid in espousing self-contradictory pleas of the petition being premature and barred by limitation. We may also be not oblivious of the fact that in the case of Parvesh Magoo (supra) the ATS was dated 03.06.2014 and the OC was applied for on 05.07.2018. In the present case, the ATS were executed between 2014 to 2016 and the CD has raised the plea that cause of action should be counted from expiry of 57 months from 19.12.2023. Such approach of the CD cannot be appreciated. As far as the allegation regarding ulterior motive of the various governmental agencies is concerned, such attitude at their end is unfortunate. In any case, we are unable to accept the plea that the CD has not committed default in handing over the possession.

39. As far as the plea regarding disqualification of 12 of the Petitioners is concerned, since the Corporate Debtor has not refunded the amount paid by them, it cannot be contended that despite their dues being still payable by the CD, they cannot be treated as allottee/homebuyers. As could be ruled by

Hon'ble Supreme Court in **Vishal Chelani and Others vs. Debashis Nanda** [Civil Appeal No. 3806 of 2023] passed on 06.10.2023, a Financial Creditor entitled to approach RERA stays as home buyer and his position cannot be disturbed. We may also be not oblivious of the fact that in terms of the provisions of Section 238 of IBC, 2016, the present proceedings have overriding effect over the proceedings before RERA. Para 9 of the judgment of Hon'ble Supreme Court reads thus:-

> "***9.*** *The Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Natwar Agarwal (HUF) (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party – in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. Is artificial; it amounts to "hyper-classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced."*

40. Once, the CD has not refunded the amount paid to it by 12 of the Petitioners, we are unable to held that they cannot be treated as allottees.

Even otherwise also, as could be ruled by Hon'ble NCLAT in **Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors.** [Company Appeal (AT) (Insolvency) No. 127 of 2023] passed on 21.10.2022, the requirement of threshold limit needs to be fulfilled at the time of filing the application only. In the present case, as on date of filing the application, the CD is in default qua all the Petitioners, thus we cannot countenance the plea of the CD that 12 out of 79 Petitioner should not be treated as homebuyers or Financial Creditors. Para 45 of the judgment in **Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors.** (supra) reads thus:-

> ***"45.*** *Ld. Counsel for the Appellant has also contended that eight allottees have settled their matters hence they should be excluded from number of 100 which need to be fulfilled. Hon'ble Supreme Court has answered the said question as to what is the point of time when the threshold requirement has to be proved. In Manish Kumar itself it has been answered that requirement of threshold under proviso in Section 7(1) must be fulfilled as on the date of filing of the Application. The fact that eight allottees have settled the matter is thus inconsequential and eight allottees cannot be excluded in the counting of 100 allottees which are required to be fulfilled as threshold. The provision of Section 7(1) Second Proviso inserted by Act No. 1 of 2020 having been explained by the Hon'ble Supreme Court, the law is well settled that all applicants who have joined the Section 7 Application have not fulfilled the threshold individually nor claim of all the applicants individually has to be within time in event there is default of more than Rs. 1 Crore and default of Rs. 1 Crore on basis of which the application is filed is well within time. The mere fact that claim of some other barred by time is insignificant. Application under Section 7 of the Code triggered when default of Rs. 1 Crore qua some of the applicant or some other financial creditors is fulfilled, Insolvency Resolution Process under Section 7 can commence."*

41. It would not be out of context to refer to explanation to third proviso to Section 7(1) of IBC, 2016, which provides that for the purpose of sub-section (1) of Section 7, a default includes a default in respect of a financial debt owed not only to the Financial Creditor but to any other Financial Creditor of the Corporate Debtor. The explanation reads thus: -

> "*Explanation- For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*"

42. From the aforementioned, it is clear when the defaulted amount of debt is more than Rs.1 Crore, even those to whom the debt is not is owed may also join the petition. In the present case, it is not so that the amount of money deposited by the homebuyers with the CD is less than the threshold limit mentioned in Section 4 of IBC, 2016.

43. As far as the plea of Force Majeure is concerned, a reading of clause 11.1 of the ATS indicate that the time consumed by the authorities in giving the clearance is different from Force Majeure and the two situations cannot be confused. Since, the units are not ready even after 7-9 years from the date of ATS and the first license issued by DTCP could expire in the year 2017, we are unable to appreciate the plea of 'Force Majeure' taken in the year 2023, when flats are not complete.

44. As far as the plea of delay is concerned that the petition qua some of the Petitioners mentioned in para 3 of the Written Synopsis is within limitation. The para read thus:-

"3. The present Petition is within Limitation, for several of the claims of the petitioning creditors forming the subject matter are within limitation.

3.1. Whereas, the date of default for each allottee is given in Annexure A6 at Pg. 390 – 394 of the Petition, of the 78 Petitioning Creditors here, a few of those whose the date of default (calculated as 48 months from the date of ATS) is within three years before the date of the present petition, per Article 137 of Limitation Act, 1963, are listed below along with the cumulative amount in default:

S. No.	Name	Date of Possession	Amount Claimed
4.	Ambar Prakash Rupesh	15.05.2021	56,72,240/-
21.	Dilip Das	20.06.2022	46,55,275/-
58.	Rita Chawla	31.10.2022	29,29,544/-
72.	Sushil Tanwar	06.04.2022	36,74,540/-
74.	Vijay Kumar Singh	15.06.2020	42,83,813/-
	Total		2,12,15,412/-

3.2. Indeed, once the suo moto extension of limitation grated by the Hon'ble Supreme Court – from 15.03.2020 to 28.02.2022 – in its order dated 01.2022 is considered, further claims shall be within limitation as contemplated in Article 137 of the Limitation Act, 1963.

3.3. The Hon'ble Supreme Court in its judgement in ***Manish Kumar v. Union of India & Anr., (2021) 5 SCC 1*** *@ Para 159 and Paras 170-175, has held that a Petition shall be maintainable for all allottees, when the cause of action is within limitation for just one of the allottees – placed herewith as* ***Annexure 1.***

3.4. Accordingly, it is submitted that the present petition is not barred by limitation.

3.5. The Petition was first filed on 16.11.2022 in C.P. No. 881/2022 and was withdrawn with liberty to refile, vide order dt. 01.01.2023 (Kindly see Annexure A9 at Pg. 820 of the Petition). Again, if the date on which the first petition was filed is considered, claims of several more petitioning creditors would be within limitation as contemplated in Article 137 of the Limitation Act, 1963

3.6. Considering, but without admitting, the Corporate Debtor's position on interpretation of clause 11 of the ATS, the case could be pitched no higher than the date on which completion and possession was stipulated in the registration of the project with RERA. If it is to be accepted that possession of all units was to be given on the date of completion stipulated in the registration with RERA, irrespective of the dates promised within the allotment letters/ ATS, the final revised date of completion – after giving relief for COVID period – was 31.12.2021 (Kindly see: Annexure A-1 at Pg. 5 of Petitioners' Additional Affidavit, dated 12.12.2023). If that is so, then the claims of all the petitioning creditors is within limitation per Article 137 of the Limitation Act, 1963.

45. Thus, in terms of the provisions of para 175 of the judgment of Hon'ble Supreme Court in Manish Kumar vs. Union of India & Anr. 2021 SCC OnLine SC 30, the present petition needs to be treated within limitation. Para 43 of the judgment of Hon'ble NCLAT in **Mist Avenue Pvt. Ltd. vs. Nitin Batra & Ors.** (supra), wherein the judgment of Hon'ble Supreme Court is referred to reads thus:-

"43. The question of application being barred to sue and the allottees who are part of joint application was also answered in paragraph 175 of the Judgment which is to the following effect:

> *"175. Another aspect, which is raised, is that in the example of hundred allottees, if they have agreements, under which, the date of default is different, how is the application to be drafted and processed? What, if the debt is barred qua some of the applicants, whereas, it is not so in regard to the other applicants. Taking a cue from the Explanation to Section 7(1), all that would be required is, to plead the default, no doubt, in the sum of Rs. 1 Crore, which is not barred as the cause of action. In other words, if a law contemplates that the default in a sum of Rs.1 crore can be towards any financial creditor, even if he is not an applicant, the fact that the debt is barred as against some of the financial creditors, who are applicants, whereas, the application by some others, or even one who have moved jointly, fulfill the requirement of default, both in terms of the sum and it not being barred, the application would still lie."*

46. The CD has also raised the plea that the rejoinder filed on behalf of the Petitioners should not be taken into consideration. Though, we have recorded the contentions raised in the rejoinder, in our order, but we have not relied upon any of those contentions. Thus, the plea raised on behalf of the CD need not be dealt with.

47. As can be seen from Section 7(5) of IBC, 2016, while taking a decision regarding admission or rejection of an application filed under Section 7 (1) of the Code, what we need to see is that there is debt and default regarding the same. We can also see that along with the petition, the Petitioners have enclosed the documents referred to in Regulation 8(A)(2) of IBC, 2016. The Regulation reads thus: -

"8A. (2) The existence of debt due to a creditor in a class may be proved on the basis of –

(a) the records available with an information utility, if any; or"

48. In the wake, we are left with no option, but to admit the present petition. Ordered accordingly. Nevertheless, we may not be oblivious of the fact that in the reply filed by the Corporate Debtor, it has been alleged that two of the Petitioner viz. Mr. Aditya Tyagi and Mrs. Kalpana Jain are using the present petition as a mechanism to settle scores for not awarding them work in the Corporate Debtor. Para 7B of the reply reads thus: -

"**7B. Vengeance-** *Mr. Aditya Tyagi, also one of the authorized representatives in the captioned Petition, had previously signed a contract with M/s Exotic Buildcon Pvt. Ltd. (engaged in construction activity of Aravali Heights, earlier project of the Corporate Debtor) for providing installment of firefighting services/ equipment at the project site of Aravali Heights. The said person had expressed his willingness to continue with the current project of the Corporate Debtor however, the management decided not to give the said contract to Mr. Aditya Tyagi as the work quality was sub-standard and the Corporate Debtor had faced quality issues with respect to equipment installed/ supplied by Mr. Aditya Tyagi. The said person is also the perpetrator of joining allottees together to file the captioned Petition in order to cause harm to the Corporate Debtor and in effect force the Corporate Debtor into insolvency. Mrs. Kalpana Jain is also an alleged allottee in the captioned Petition and her husband, Mr. Manish Jain had on various occasions approached the Corporate Debtor for contract of firefighting services/ equipment at the project site. The above persons cannot be said to be bonafide allotees in*

terms of the Code as they are misusing the Code to their benefit to settle the scores with the Corporate Debtor/ management of Corporate Debtor."

49. To meet the above concern espoused on behalf of the Corporate Debtor i.e. two of the Petitioners are having extraneous interest in the CD and have joined the petition out of vengeance, we refuse to appoint the IP suggested by the Petitioners.

50. In **E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd.** in (Civil Appeal No. 3325 of 2020), Hon'ble Supreme Court though ruled that while the Adjudicating Authority and Appellate Authority can encourage settlement but they cannot direct them by acting as courts of equity, nevertheless, their lordships could also view that since the ultimate purpose of IBC is to facilitate the continuance and rehabilitation of the Corporate Debtor, the settlement have to be encouraged. The view taken by their lordships is that the Adjudicating Authority should not abdicate their jurisdiction to decide a petition, under Section 7, by directing the Respondent to settle the remaining claims. Para 28 of the judgment reads thus: -

*"*28 *Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation. As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution "in a time bound manner" for maximization of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders. What the Adjudicating Authority and Appellate*

Authority, however, have proceeded to do in the present case is to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who are aggrieved by the settlement process, to move fresh proceedings in accordance with law. Such a course of action is not contemplated by the IBC."

Thus, in the present case when we have exercised our jurisdiction under Section 7 of IBC, 2016 and have passed the required order, keeping in view of the provisions of the IBC, 2016 viz. Section 12A thereof, read with Regulation 30A IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP should ensure that if there is a possibility of settlement, the same should not be discouraged or avoided.

51. **In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and** as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

(a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent.

52. Accordingly, we appoint **Mr. Lekhraj Bajaj** having **Registration No: IBBI/IPA-002/IP-N00039/2016-17/10078** and **e-mail ID: lekhrajbajaj@ rediffmail.com** is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that Mr. Lekhraj Bajaj shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Nevertheless, since the CD is a Real Estate Project, the IRP would ensure that the interest of Homebuyers/Financial Creditors in a class is protected in all respects and the operation of the Corporate Debtor is managed as going concern. The Personnel of Corporate Debtor, its Promoters or any other person associated with the management of the Corporate Debtor shall extend all assistance and corporation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. If at any stage, the circumstances, warrant, filing of application under Regulation 30A of IBBI (Resolution Process for Corporate Persons) Regulations, 2016, read with Section 12A of IBC, 2016, the IRP/RP shall discharge his duty in terms of the provisions, without any delay or demur.

53. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

54. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

55. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

Intervention Petition-85/2023

The prayer made in the present petition is to permit the Petitioners to intervene qua IB-281/ND/2023 and to dismiss the petition. The salient contention espoused in the petition is that the maximum number of allottees support the current management and may not favor the new management, which may lead to Liquidation of the CD. Such apprehension is misplaced and baseless. As can be seen from Section 12A of the IBC, 2016, the Adjudicating Authority may allow the withdrawal of the application admitted under Section 7 of IBC, 2016, on an application made by the CoC with the approval of 90% voting share. Thus, if only 10% of homebuyers have alleged default, the 90% Financial Creditors can always pass resolution for withdrawal of application. In terms of the provisions of Regulation 30A(5) of IBBI (Insolvency Resolution Process for Corporate Persons). The application need to be moved through the RP. We have already addressed the concern,

by not appointing the IP suggested by Petitioners as RP. Additionally, the management of the CD can always settle the matter with the Applicant and an application under Regulation 30A(1)(a) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, may be filed. Thus, the Creditors have their remedies as members of CoC and not to intervene in the application filed under Section 7(1) of IBC, 2016. At this stage, intervention may be allowed, only if the application is collusive or the intervener is prepared to repay the amount of default to the Applicant. The present petition is misconceived and is accordingly rejected.

IA-5303/2023

The plea espoused in the captioned application is for taking on record the additional documents viz. the Settlement Agreement dated 25.01.2023 and the order dated 04.09.2023 passed by HRERA, Panchkula in CC/1429/2020, CC/1430/2020, CC/1401/2020 and CC/2708/2019. In view of the order passed in IB-281/ND/2023, the application has become infructuous and is disposed of accordingly. Nevertheless, in para 50 of the order passed in C.P. (IB)-281/ND/2023, we already observe that the possibility of settlement between Creditors and Debtors should not be discouraged by the RP/IRP.

IA-6434/2023

The captioned application has been preferred by as many as 212 applicants, seeking dismissal of the IB-281/ND/2023. The plea espoused in

the application is identical to the one raised in Intervention Petition-85/2023. Para 7 of the application reads thus:-

> *"7. Furthermore, there is a threat of the Corporate Debtor ending into liquidation as maximum number of the allottees support the current management and the said allottees may not vote in favour of a new management in the form of the Resolution Applicant which will ultimately lead to rejection of any resolution plan and the Corporate Debtor will be pushed into liquidation which would prejudice the interest of the allottees the most as the allottees under the Code though are classified as Financial Creditors but are not secured creditors. The said being the case, the actual dues to the genuine allottees will come down low in priority as per the waterfall mechanism."*

2. In view of the order passed in Intervention Petition-85/2023, the present IA is rejected. It goes without saying that being a Financial Creditor in a class, the Applicants would be entitled to resort to the remedy available to them as member of CoC i.e. in terms of the provisions of Section 12A of IBC, 2016, read with Regulation 30A of IBBI (Insolvency Resolution for Corporate Person) Regulations 2016, if and when the stage arises. No Cost.

Intervention Petition-02/2024

The present petition has been preferred by Mr. Nishant Joshi, on behalf of 97 allottees, owning 62 units in the project "CASA ROMANA" of the CD. The plea espoused in the petition is for permitting the Petitioners to intervene in C.P. (IB)-281/ND/2023 and to dismiss the said petition. The salient contention raised in the application is that this Tribunal keep the present proceedings suspended to enable the CD to navigate its financial challenges. Para 21 of the application reads thus:-

*"21. That the precedent set by the **Vidarbha Industries case (Supra)** was adhered to by the Hon'ble National Company Law Tribunal (NCLT), Indore in the matter of **CP(IB) 500 of 2018 titled "State Bank of India vs Krishidhan Seeds Pvt Ltd"**. In this case, the NCLT, after acknowledging the earnest efforts of the corporate debtor's management to extricate the company from its debt predicament, opted not to immediately admit the corporate debtor into the Corporate Insolvency Resolution Process (CIRP) or dismiss the application. Instead, the Hon'ble tribunal decided to temporarily suspend the proceedings, keeping them in abeyance. This decision by the Hon'ble NCLT, Indore, granted the corporate debtor some time to navigate its financial challenges."*

2. Firstly, the law does not provide for intervention by the Creditors qua CD, in the petition filed under Section 7 of IBC, 2016, by different creditor/creditors. The intervention is permissible only when the plea raised in the petition is regarding the collusion between the Creditor and the Corporate Debtor to file such petition or the intervener want to discharge the debt of the Corporate Debtor. Secondly, the Petitioners are Financial Creditors in a class qua a Corporate Debtor and would be in a position to ensure filing of an application under Section 12A of IBC, 2016, read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Person) Regulations 2016. It is not so that the Financial Creditor in a class are without remedy. Besides, in terms of the provisions of Section 17, 18, 19 and 20 of IBC, 2016, the IRP is liable to manage the affairs of the CD in its best interest. In the process, the IRP is also liable to watch the interests of the Creditors. The Applicants are not without remedy. Nevertheless, they cannot be permitted to espouse that the aggrieved Financial Creditors qua whom the

default is committed should not be permitted to invoke the provisions of Section 7 of IBC, 2016. The Corporate Debtor is not permitted to make choices or discrimination qua the Creditors. Section 43 of IBC, 2016, is introduced to curb such differential treatment meted by the Corporate Debtor to the Creditors. The present petition in a way is an illustration that some of the Financial Creditors in a class are sided with by the CD.

3. It would not be out of place to note that there is nothing to prevent the CD from entering into settlement qua the default with the Petitioner and persuade them to move application under Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. **In E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd.** [Civil Appeal No. 3325 of 2020], hon'ble Supreme Court viewed that the settlement may be encouraged. Para 28 of the judgment reads thus:-

> "28 *Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation. As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution "in a time bound manner" for maximization of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders. What the Adjudicating Authority and Appellate Authority, however, have proceeded to do in the present case is to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who are aggrieved by the settlement process, to move fresh proceedings in*

accordance with law. Such a course of action is not contemplated by the IBC."

4. One may also be not oblivious of the fact that the order qua the C.P. (IB)-281/ND/2023 was reserved on 21.12.2023 and the same is delivered today. If the CD could have desired, it could have taken steps to settle the default with the Petitioners. In any case, the present petition is not maintainable and is accordingly rejected. No Cost.

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

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