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

IA. Nos. 1530/ND/2024, 1430/2024, 3855/2024
IN
Company Petition No. (IB)-752(ND)/2023

IN THE MATTER OF:

(Under Section 7 of IBC, 2016)

IDBI Trusteeship Service Ltd. **... Applicant/ Financial Creditor**

Versus

Santur Infrastructures Pvt. Ltd. **... Respondent/ Corporate Debtor**

AND IN THE MATTER OF IA. NO. 1530/ND/2024:

Under Section: 60(5) of IBC 2016 r/w Rule 11 of NCLT Rules, 2016

IDBI Trusteeship Services Limited
Having Registered office:
Ground Floor, Universal Insurance Bldg.
Sir Phirozshah Mehta Rd., Fort Bazargate
Mumbai-400001 **... Applicant**

Versus

Santur Infrastructures Pvt Ltd
Having registered office:
301, Third Floor, Indraprakash Building,
21, Barakhamba Road,
New Delhi-110001 **... Respondent**

AND IN THE MATTER OF I.A. NO.1430/ND/2024:

Under Rule 11 of the NCLT Rules, 2016

Santur Infrastructures Pvt Ltd
Having registered office:
301, Third Floor, Indraprakash Building,
21, Barakhamba Road,
New Delhi-110001 **... Applicant**

Versus

IDBI Trusteeship Services Limited
Having Registered office:
Ground Floor, Universal Insurance Bldg.

Sir Phirozshah Mehta Rd., Fort Bazargate
Mumbai-400001 **... Respondent**

AND IN THE MATTER OF IA. NO. 3855/ND/2024:

Under Rule 11 of the NCLT Rules, 2016

IDBI Trusteeship Services Limited
Having Registered office:
Ground Floor, Universal Insurance Bldg.
Sir Phirozshah Mehta Rd., Fort Bazargate
Mumbai-400001 **... Applicant**

Versus

Santur Infrastructures Pvt Ltd
Having registered office:
301, Third Floor, Indraprakash Building,
21, Barakhamba Road,
New Delhi-110001 **... Respondent**

Order Delivered on: 08.04.2025

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	**:**	Sr. Adv. Krishnendu Datta**,** Adv. Pranjit Bhattacharya, Adv. Salonee Shukla, Adv. Akhil, Adv. Geetika Sharma, Adv. Tarini Khurana
For the Respondent	**:**	Sr. Adv. Pooja Mehra Saigal, Adv. Rajat Joneja, Adv.Sakshi Kapoor

ORDER

PER: SHRI ASHOK KUMAR BHARDWAJ, MEMBER (J)

As can be gathered from the synopsis filed along with the petition filed under Section 7 of IBC, 2016, the Applicant viz. IDBI Trusteeship Services Limited is a company incorporated under the Companies Act, 1956, registered under the Securities and Exchange Board of India (Debenture Trustees)

Regulations, 1993. It has its registered office at Ground Floor, Universal Insurance Bldg, Sir Phirozshah Mehta Rd., For Bazargate Mumbai-400001. The Applicant is having an on-going fiduciary relationship with Kautilya Finance BV.

2. The M/s Shree Vardhman Infraheights Private Ltd. ("**SVIPL"**) registered vide CIN No. U70101DL2011PTC222557 is a private limited company and is engaged in the business of development, marketing and sale of real estate inter alia. The SVIPL has been developing a group Housing Project called "Shree Vardhman Victoria" (hereinafter referred to as **"the Project")** a residential colony over land measuring 10.9687 acres in village Badshahpur, Sector 70, Gurugram Manesar Urban Complex, Haryana (hereinafter referred to as "**the Project Land**").

3. The above Project land is part of land of the Corporate Debtor, Santur Infrastructures Pvt Ltd (100% wholly owned subsidiary of SVIPL) and of some individual landowners on which the Project is being developed by the Corporate Debtor. It is submitted that the Corporate Debtor has the sole and exclusive right and interest over the development rights pertaining to the whole of the Project Land and the Project.

4. For the purpose of facilitating the development and construction qua the Project by raising finance, SVIPL proposed to issue and allot Debentures by private placement to Kautilya Finance BV.

5. The Kautilya Finance BV, a foreign portfolio investor registered with Securities and Exchange Board of India (SEBI), is a Company incorporated

under the laws of Netherlands, having its office at Apollolaan 151, Amsterdam, Netherlands. The SVIPL issued an information Memorandum-cum-Private Placement Offer Letter dated 07.04.2016 for the aforesaid purpose, based on which, Kautilya Finance BV agreed to invest in SVIPL by subscribing to the debentures in question and following agreements, as mentioned in the written synopsis filed along with the petition were executed:

I. Debenture Subscription Agreement dated 7.4.2016 (hereinafter referred to as the "**Original DSA**") was executed between KFBV and SVIPL, Corporate Debtor, Mr. Sandeep Jain, Mr. Sachin Jain, Mr. Rishi Gupta, Mr. Vivek Aggarwal, Mr. Gautam Chowdhary, Tushar Goel, in terms of which, M/s Kautilya Finance BV agreed to subscribe to 140 (One Hundred and Forty) number of to-be listed rated, senior, fully secured, redeemable, transferable, interest-bearing non-convertible debentures of face value of INR 1,00,00,000/- (Indian Rupees One Crore only) each, aggregating upto 140,00,00,000/- (Indian Rupees One Hundred and Forty Crores only), to be issued in 2 (two) series being Series A Upto INR 90,00,00,000/-(Indian Rupees Ninety Crores only) and Series B - Upto INR 50,00,00,000/- (Indian Rupees Fifty Crores only), for cash, at par, in dematerialised form on a private placement basis at the Interest rate as set out in Schedule 2 (Terms of Issue). It is pertinent to note that only series A was subscribed on 23.5.2016.

II. Debenture Trust Deed dated 19.04.2016 (hereinafter referred to as the "**Original DTD**") was executed between the applicant, the Corporate Debtor, Applicant, SVIPL, Mr. Sandeep Jain, Mr. Sachin Jain, Mr. Rishi Gupta, Mr. Vivek Aggarwal, Mr. Gautam Chowdhary, Tushar Goel

wherein, Applicant agreed to act in a fiduciary capacity as trustee for the sole and exclusive benefit of the Debenture Holders and its/their transferees and assignees from time to time in accordance with the terms and conditions of this Deed.

III. That on 07.04.2016 a Debenture trustee appointment agreement was executed by SVIPL under which, the Applicant was appointed as a Debenture Trustee for facilitating the transaction that is, for issuance, allotment of debentures and repayment to KFBV and was further, to act in fiduciary capacity for KFBV.

6. Further, for the purpose of securing the repayment and/ or performance of the Debentures and other secured obligations under DTD and other Definitive Agreement, Corporate Guarantee was executed by Corporate Debtor securing the secured obligations under the Series A Debentures. Clause 3.2 of the Guarantee Agreement dated 27.5.2016 as reproduced in the synopsis filed by the Petitioner along with the Petition reads thus: -

"*3.2 The Guarantor agrees and confirms that:*

(i) The Guarantor's liability hereunder is co-extensive with that of the Company;

(ii) The Guarantor shall not revoke this Guarantee Agreement and this Guarantee Agreement shall remain in force until all the Secured Obligations under the Series A Debentures have been finally paid/performed in full;"

7. Subsequently, on being approached by SVIPL to meet the further requirement of finances towards construction and development of the Project, the parties amended the Original DTD and DSA. The parties executed the First Amended DSA and First Amended DTD on 19.6.2017 and 20.7.2017

respectively, in terms of which, KFBV further subscribed to listed, redeemable, transferable, interest bearing, non-convertible Series C debentures of Rs. 25,00,00,000/- crores issued by SVIPL. With amended DTD and DSA, the Corporate Guarantee was also revised and executed on 20.7.2017.

8. The parties mutually decided to reduce the aggregated value of Series B debentures to 10,00,00,000/-(Rupees Ten Crores Only) and in view of the same the **Restated and Amended DSA and DTD** dated 27.09.2018 were executed between the parties, whereby, inter alia, the parties restated the terms of Original DSA and DTD. The KFBV subscribed Series B upto 10 (Ten) number of senior, fully secured, redeemable, transferable, interest-bearing, non-convertible debentures of face value of INR 1,00,00,000/- (Indian Rupees One Crore only) each, aggregating upto 10,00,00,000/- (Indian Rupees Ten Crores only), for cash, at par, in dematerialised form on a private placement basis at the Interest rate as set out in the restated Debenture Trust Deed dated 27.9.2018. It may be noted that by virtue of the Amended and Restated DSA, the Original DSA and amended DSA stood superseded. Besides, the Corporate Guarantee was again revised and executed on 27.9.2018.

9. It is submitted that thereafter, on 30.06.2019 an amount of Rs. 26,65,67,499/- constituting Rs. 19,15,67,499/- towards interest and Rs. 7,50,00,000/- towards first instalment of principal redemption became payable by the SVIPL to KFBV. But the SVIPL failed to honour their commitments.

10. On 05.08.2019 Applicant issued a letter to SVIPL enforcing its right under Clause 16.2 of the Restated and Amended DTD as the SVIPL failed to make repayment of the Amounts Due and 'Event of Default' occurred. After which the Applicant filed a suit in the Hon'ble Delhi High Court wherein the parties resolved the defaults and disputes by executing a settlement dated 04.11.2019.

11. Thereafter, SVIPL approached KFBV and requested to revise the repayment schedule in respect of the Debentures by executing a fresh DTD and further requested for additional funding. Since by this time, KFBV had already invested huge amounts of money in the Project being developed by SVIPL, Kautilya Finance BV and had no option but to let a New Investor (Kautilya Real Estate Fund ["KREF"]) be made available to SVIPL and execute a fresh DTD and thus, agreed to the same.

12. Subsequent thereto, on 04.11.2019, the Applicant in capacity as a Debenture Trustee of KFBV and KREF, the Corporate Debtor, Sandeep Jain, Sachin Jain, Rishi Gupta, Vivek Aggarwal, Gautam Choudhary, Tushar Goel, and SVIPL agreed and entered into a subsequent DTD dated 04.11.2019, (hereinafter referred to as the "Third DTD") whereby, inter alia, the aforesaid parties revised the repayment schedule for the payment of interest and redemption amount regarding the above said 125 debentures. Also, the Corporate Guarantee dated 4.11.2019 was executed.

13. Nevertheless, SVIPL again failed to fulfil its payment obligation on 30.06.2020 and 30.09.2020, following which the Applicant issued default notices on 31.08.2020 and 08.11.2020 respectively.

14. On request made by the SVIPL, KFBV through the Applicant revised the repayment schedule once again vide Acknowledgement Letter dated 23.11.2020.

15. On 23.11.2021, the Applicant in capacity as a Debenture Trustee of KFBV, the Corporate Debtor, Sandeep Jain, Rishi Gupta, Gautam Choudhary, Tushar Goel and SVIPL agreed and entered into a subsequent DTD dated 23.11.202 (hereinafter referred to as the "Amendment to Third DTD") whereby, inter alia, the aforesaid revision of the repayment schedule for the payment of interest and redemption amount of the existing debentures as per letter dated 23.11.2020 was incorporated in the Amendment to Third DTD. Along with this SVIPL further raised certain funds by issuing senior, fully secured, unlisted, redeemable, transferable, interest-bearing non-convertible debentures of face value of INR 1,00,00,000/- (Indian Rupees Ten Lakhs Only) each, aggregating upto 25,00,00,000/- (Rupees Twenty- Five Crores Only) ("Additional Series D Debentures").

16. SVIPL in Amendment to Third DTD agreed and confirmed that as on 30.09.2021, the NCD's Subscribed & outstanding, the interest accrued and outstanding, amounts due but not paid and tax deducted at source (TDS) due but not paid in respect of all the Series Debentures as provided in Table below:

Table I

As on 30 September 2021	Series A	Series B	Series C	Series D	Series E	Total
Total NCDs subscribed and outstanding (A)	90,00,00,000	10,00,00,000	25,00,00,000	30,00,00,000	8,00,00,000	1,63,00,00,000
Interest accrued and outstanding as on 30 Sep 2021 (B)	52,17,66,039	4,31,48,858	15,33,37,055	6,83,95,449	2,73,17,720	81,39,65,122
TDS Due But Not Paid as on 30 Sep 2021 (C)	2,13,64,897	11,21,223	30,68,405	-	-	2,55,74,525
Total balance outstanding to be paid (A+B+C)	1,44,31,50,936	14,42,70,081	40,64,05,460	36,83,95,449	10,73,17,720	2,46,95,39,646
Principal and Interest amounts due but not paid (In default) as on 30 Sep 2021	41,24,01,079	3,43,68,062	12,16,71,191	6,72,39,403	4,57,91,633	68,14,71,368
Interest Rate	16.50%	16.50%	16%	18%	24%	
Allotment Date	23-May-16	31-Oct-18	18-Aug-17	20-Dec-19	29-May-20	

17. SVIPL further acknowledged that the total Amount Due but Not Paid to the Debenture Holders including both KFBV and KREF as on 30.09.2021 is Rs. 68,14,71,368/- (Rupees Sixty- Eight Crores Fourteen Lakhs Seventy-One Thousand Three Hundred and Sixty-Eight only) ("Amounts Due But Not Paid") as provided above in the above table and Rs. 2,55,74,525/- (Rupees Two Crores Fifty-five Lakhs Seventy-Four Thousand Five hundred and twenty-five only) is payable as TDS on interest ("TDS Due But Not Paid") as on 30.09.2021.

18. It was expressly clarified that the total balance outstanding to be paid as shown in above table as of 30.09.2021 of Rs.2,46,95,39,646/- (Rupees Two Hundred Forty-Six Crores Ninety-Five Lakhs Thirty-Nine Thousand Six hundred and Sixty-Eight only), shall be governed by the existing Repayment Schedules in the manner indicated in Annexure 1A, 1B, 1C, 1D and 1E of the Amendment to Third DTD. Further, the amended DTD was made an integral part of the Third DTD dated 4.11.2019 which was to be read in unison with the terms and conditions of Third DTD dated 04.11.2019. Ergo, the Corporate Guarantee was once again amended to secure addition debentures.

19. Even after the revision of repayment schedule, the SVIPL failed to repay the amount of financial facilities in terms of the Amendment to Third DTD from the first due date i.e. 31.12.2021.

20. Therefore on 01.07.2023 and 26.8.2023 the Applicant sent legal notices under Section 138 of the Negotiable Instrument Act regarding dishonour of cheques, to the SVIPL along with its directors.

21. The Applicant vide letter dated 27.9.2023 sent a default notice to the SVIPL and Amendment to the Restated and Amended Debenture Trust deed dated 23.11.2021 notifying that the Event of default has occurred in terms of Clause 16.1 of Amendment to the Restated and Amended Debenture Trust deed dated 4.11.2019. The Applicant further informed SVIPL that as on 30.06.2023 an amount of Rs.2,56,56,01,400/- (Rupees Two Hundred Fifty- Six Crores Fifty-Six Lakhs One Thousand Four hundred only).

22. It is submitted that the amounts mentioned above continue to be due and payable to KFBV under the provisions of the Third DTD on the date when it became due and payable as well as till date.

23. Therefore, the Applicant vide Invocation cum Demand Notice dated 4.12.2023 invoked the Corporate Guarantee provided by the Corporate Debtor in favour of the Applicant under the Corporate Guarantee Agreements dated 27.5.2016, 20.7.2017, 27.9.2018, 4.11.2019 and 11.3.2020 and called upon the Corporate Debtor herein to pay an amount of Rs. 2,63,00,46,668/- (Rupees Two Hundred Sixty-Three Crore Forty-Six Thousand Six Hundred Sixty-Eight only) within 3 days from the receipt of the above said Notice.

24. Therefore, as on 30.09.2023 an amount of Rs. 2,63,00,46,668/- (Rupees Two Hundred Sixty-Three Crore Forty-Six Thousand Six Hundred Sixty-Eight only) is due and payable calculation of which is given below:

I. Principal and Interest amount of Rs. 1,52,97,53,883/- (Rupees One Hundred Fifty-Two Crore Ninety-Seven Lakh Fifty-Three Thousand Eight Hundred Eighty-Three only) under the Series A Debentures. Other amounts (such as TDS, Interest on Interest, TDS on Interest on Interest, etc.) of Rs. 37,21,98,689/- (Rupees Thirty- Seven Crore Twenty-One Lakh Ninety-Eight Thousand Six Hundred Eighty-Nine Only) under Series B Debentures;

II. Principal and Interest amount of Rs. 17,01,91,067/- (Rupees Seventeen Crore One Lakh Ninety-One Thousand Sixty-Seven only) under the Series B Debentures. Other amounts (such as TDS, Interest on Interest, TDS on Interest on Interest, etc.) of Rs. 2,21,95,202/- (Rupees Two Crore Twenty-One Lakh Ninety-Five Thousand Two Hundred Two Only) under Series B Debentures;

III. Principal and Interest amount of Rs. 46,64,28,103/- (Rupees Forty-Six Crore Sixty-Four Lakh Twenty-Eight Thousand One Hundred Three only) under the Series C Debentures. Other amounts (such as TDS, Interest on Interest, TDS on Interest on Interest, etc.) of Rs. 6,92,79,723/- (Rupees Six Crore Ninety-Two Lakh Seventy-Nine Thousand Seven Hundred Twenty Three Only) under Series C Debentures;

IV. Rs 7,35,42,572/- (Rupees Seven Crore Thirty-Five Lakh Forty-Two Thousand Five Hundred Seventy-Two only) being as Interest on unpaid amounts from 30.06.2023 including default interest and interest on interest on Series A;

V. Rs 76,81,686/- (Rupees Seventy-Six Lakh Eighty-One Thousand Six Hundred Eighty-Six only) being as Interest on unpaid amounts from 30.06.2023 including default interest and interest on interest on Series B;

VI. Rs 2,04,21,106/- (Rupees Two Crore Four Lakh Twenty- One Thousand One Hundred Six only) being as Interest on unpaid amounts from 30.06.2023 including default interest and interest on interest on Series C;

25. The details of the debt and default are given in Part-IV of the application, which reads thus: -

PART- IV

PARTICULARS OF FINANCIAL DEBT

1.	**TOTAL AMOUNT OF DEBT GRANTED AND DATE OF DISBURSEMENT**	That Kautilya Finance BV initially subscribed to the Non-Convertible Debentures issued by the SVIPL **Disbursement Amount** – INR 125,00,00,000/-

Debentures	Amount Subscribed	Date of Disbursement
Series A Debentures	90,00,00,000/-	23.5.2016
Series B Debentures	10,00,00,000/-	31.10.2018
Series C Debentures	25,00,00,000/-	18.8.2017

2.	**AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE OF WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR THE COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR**	As on 30.09.2023 an amount of Rs. 2,63,00,46,668/-

Principal Amount in Default (in Rs)	Interest Rate	Total Amounts in Default With Interest and TDS (in Rs)
0	16.5%	0
0	16.5%	0
0	16.5%	0
0	16.5%	0
0	16.5%	3,62,99,402
0	16.5%	6,12,55,166
0	16.5%	18,65,38,454
0	16.5%	41,24,01,079
12,22,20,153	16.5%	69,72,03,090
27,50,42,650	16.5%	90,40,34,209
42,28,69,829	16.5%	1,10,84,69,682
56,87,48,400	16.5% & 15.85%	1,31,25,43,500
66,49,56,015	16.5% & 15.85%	1,46,89,10,031
90,00,00,000	16.5% & 15.85%	1,76,49,59,796
90,00,00,000	16.5%,15.85% & 15.5%	1,82,84,10,000
90,00,00,000	16.5%,15.85% & 15.5%	1,90,19,52,572

(Rupees Two Hundred Sixty Three Crore Forty Six Thousand Six Hundred Sixty Eight only) is due and payable calculation of which is given below:

FORM)

Series A

Series B

Principal Amount in Default (in Rs)	Interest Rate	Total Amounts in Default With interest and TDS (in Rs)
0	15.5%	0
0	15.5%	0
0	15.5%	0
0	15.5%	0
0	15.5%	28,62,100
0	15.5%	48,29,788
0	15.5%	1,50,87,435
0	15.5%	3,43,68,062
0	15.5%	4,85,06,940
0	15.5%	5,39,44,735
0	15.5%	5,96,44,276
0	15.5%	6,56,19,783
0	15.5%	7,18,18,954
98,10,223	15.5%	8,79,20,575
4,20,47,956	15.5%	12,67,52,539
10,00,00,000	15.5%	19,23,86,269

Series C

Principal Amount in Default (in Rs)	Interest Rate	Total Amounts in Default With interest and TDS (in Rs)
0	16.0%	0
0	16.0%	0
0	16.0%	0
0	16.0%	0
0	16.0%	1,08,35,129
0	16.0%	1,82,84,257
0	16.0%	5,53,85,176
0	16.0%	12,16,71,191
0	16.0%	16,79,76,532
0	16.0%	18,28,17,562
0	16.0%	19,83,56,305
0	16% & 15.5%	21,43,83,221
0	16% & 15.5%	23,09,46,192
2,45,25,557	16% & 15.5%	27,22,52,702
10,51,19,891	16% & 15.5%	37,04,06,611
25,00,00,000	16% & 15.5%	53,57,07,826

Date of Default is 7.12.2023

26. In the reply filed by it, the Respondent has espoused thus: -

a) The captioned petition preferred by the Respondent is not maintainable, as the allegations made therein are false, frivolous, incorrect and misleading.

b) The petition preferred by the Applicant is vexatious and has been preferred for oblique purpose i.e. other than to seek resolution of corporate insolvency.

c) The application preferred is in contravention of the object and intent of IBC, thus the provisions of Section 65 of IBC need to be resorted against the Petitioner.

d) The Applicant is working in the position of a trustee and has been entrusted with fiduciary duty towards debenture holders, but acting in derogation of its contractual obligations. It has indulged in unauthorized use and diversion of funds by despotic exercise of the authority vested under the Debenture Trust Deed to control the project account of the Respondent.

e) The claim of the Applicant is founded on corporate guarantees dated 27.05.2016, 20.07.2016, 27.09.2018, 04.11.2019 and 11.03.2020, executed by the Respondent in favour of the Applicant. The Respondent is fully owned subsidiary of Shree Vardhman Infraheights Pvt. Ltd. (Borrower).

f) The Borrower is engaged in construction and development of group housing project on the land admeasuring 10.9687 acres situated at Village Badshapur, Gurgaon (Project Land) in the name and style of "Shree Vardhman-Victoria" with an approved FAR of 77,580.04 square meters.

g) The Project Land comprises of land admeasuring approximately 3.9812 acres owned by individual landowners and land admeasuring approximately 6.9875 acres owned by the Respondent.

h) Pursuant to the Collaboration Documents executed between the Borrower, Respondent and Individual Landowners, the Respondent and the Individual Landowners have unconditionally and irrevocably transferred all the Development Rights over the Project Land in favour of the Borrower.

i) The petition filed by the Petitioner is liable to be dismissed as the Applicant is guilty of suppression veri suggestion falsi, as it has failed to disclose the pendency of the execution petition filed by it before the Hon'ble High Court, wherein it has sought execution of the Settlement Agreement and control of the entire project including but not limited to representation on behalf of the Respondent before all authorities and permission to negotiate with the customers on behalf of the Respondent.

j) As on date, it is the Petitioner who is controlling the entire project. The same is even evident from the fact that one of the terms of the Settlement Agreement dated 04.11.2019 entered into between the Petitioner and the Borrower was to constitute the Project Monitoring Committee that shall monitor the whole project. The PMC consists of 3 members of the Applicant and 2 members of the Borrower. Thus, the Applicant being in majority is taking all the decision with respect to the project including but not limited to cashflow of the project.

k) On the one hand, the Petitioner has come before this Tribunal seeking initiation of Corporate Insolvency Resolution Process against the Respondent and on the other hand, the Petitioner itself is controlling the whole Project of the Respondent. The Petitioner has

not come before this Tribunal for resolution of the Respondent but only with ulterior motive to put undue pressure on it to take complete control of the project without any interference of the Borrower.

l) The conduct of the Petitioner clearly reflects that it is not only a lender but has sought to be partner in the project by becoming part of the PMC and taking decisions with respect to development of the Project and consequently delaying the same.

m) The parties undertaking joint development with a Corporate Debtor cannot invoke proceedings under Section 7 of the Code.

n) The Borrower has also filed a petition under Section 9 of the Arbitrator and Conciliation Act, 1996, before the Hon'ble High Court of Delhi, titled as "Shree Vardhman Infraheights Pvt. Ltd. vs. IDBI Trusteeship Services Limited & Anr." viz. OMP (I) COMM 166 of 2023 to highlight the atrocities and conduct of the Petitioner who had in extremely non-transparent, high-handed manner abused its position by maliciously trying to take control of the entire Project Land of the Respondent.

o) The Borrower has also preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the disputes for arbitration in terms of Clause 4.4 of the Settlement Agreement. Part arguments have already been heard by the Hon'ble High Court of Delhi on Section 8 Application.

p) The very fact that the Applicant had suppressed material fact(s) which has direct bearing on the present proceedings, amounts to

playing fraud on this Hon'ble Tribunal and disentitles the Applicant for any relief. The Execution Petition filed by the Applicant, Section 8 Application and the Section 9 Petition filed by the Borrower · is pending consideration before the Hon'ble High Court of Delhi and is next listed on 28.02.2024.

q) It is a settled position of law that a litigant should disclose all the material information and come before the court with clean hands. Any suppression of material fact shall be construed as playing fraud on the court.

r) Further, it is imperative to mention herein that the Applicant in the Execution Petition before the Hon'ble High Court of Delhi had filed an application seeking permission to file an appeal on behalf of the Borrower before the Hon'ble Haryana Real Estate Appellate Tribunal with respect to the Additional FAR against the Order dated 20.03.2023 passed by the Ld. HARERA, Gurugram. The Hon'ble High Court of Delhi vide Order dated 04.09.2023 made it clear that the Applicant has no right to file any appeal on behalf of the Borrower and the same shall not be treated as the appeal filed on behalf of the Borrower.

s) The Applicant, having failed in their alleged malicious attempt to take control of the Project, has now filed the present Section 7 Petition against the Borrower and Respondent. It is evident that the Applicant exhausted all other remedies before approaching this Hon'ble Tribunal, seemingly with a fraudulent intent to exert undue pressure on the Respondent and Borrower to meet their unlawful

demands. Notably, the Applicant itself had filed the Execution Petition, making it essential that the same be placed before this Tribunal. Additionally, the Applicant sought permission to represent the Respondent in an appeal before the RERA Appellate Tribunal, Haryana, concerning the restoration of registration, and was allowed co-representation.

t) Despite the pendency of the Execution Petition, the Applicant has engaged in forum shopping by approaching this Tribunal to execute the Settlement Agreement. By deliberately suppressing material facts, the Applicant has misled the Tribunal and acted in bad faith.

u) The Section 7 Petition, therefore, appears to be an abuse of the legal process and an attempt to manipulate proceedings. The Applicant's actions demonstrate clear mala fide intent, as they have withheld relevant information and misrepresented facts before this Hon'ble Tribunal.

v) It is well-established in law that a litigant guilty of suppresio veri suggestio falsi is not entitled to any relief. Section 65 of the IBC provides for stringent action against parties initiating CIRP with fraudulent or malicious intent. Given the Applicant's deliberate suppression of material facts and fraudulent conduct, strict action must be taken against them, and the present Application deserves to be dismissed on this ground alone.

w) Even otherwise, the Application filed by the Applicant is liable to be dismissed on the following grounds:

I. Conduct of the Applicant and Debenture Holder after becoming Member of the PMC and taking Control of the Project. The Applicant and Debenture Holder allegedly acted in a high-handed manner, abusing their position to take control of the Project. A PMC was created to oversee the Project, comprising 3 members appointed by the Applicant and 2 representatives by the Borrower, effectively placing the entire Project under the Applicant's control. By misusing this control, the Applicant deliberately delayed the Project to extract additional interest payments from the Respondent, causing unnecessary setbacks. The various acts of abusive and highhanded approach adopted by the Applicant and Debenture Holder are detailed hereinbelow:-

(i) Dominating and abusing their position while dealing with · additional FAR. The initial Project consisted of 8 towers, but the Respondent later acquired Additional FAR, which included Towers G1, G2, and J. The Borrower, via email on 30.03.2023, instructed the Applicant and Debenture Holder to halt any work or sales related to these towers since no approvals or RERA registrations were in place. Instead of complying, the Applicant and Debenture Holder proceeded with vendor negotiations for their construction without the Borrower's consent, as confirmed in an email dated 17.04.2023. The, funds from the escrow account, meant exclusively for the 8 approved towers, were misused by the Applicant and Debenture Holder for the unauthorized construction of Towers G1, G2, and J, violating

RERA provisions and the Second Amended DTD. The Borrower's intent was to complete the first 8 towers and hand over possession to customers before beginning work on the additional towers, ensuring no defaults in customer commitments.

(ii) Illegal and wrongful utilization of money deposited in the escrow Account, as per the agreed arrangement, 70% of the escrow account funds was to be utilized for constructing the first 8 towers, while the remaining 30% was allocated for the Applicant's repayment. However, the Applicant is intentionally not utilizing the 30% account for repayment, causing unnecessary interest accrual and increasing the Borrower's financial burden. Notably, the Applicant is the sole signatory to both the utilization escrow Account and the Project Revenue Escrow Account. Instead of allowing the Borrower to use the funds for completing the 8 towers, the Applicant is diverting escrow monies toward vendors for the development of additional FAR towers, which is beyond their obligation.

(iii) Negotiating with customers without consent of Borrower. The Borrower came to know that the Applicant was unilaterally negotiating with customers and offering large discounts on interest for delayed payments, despite having no authority under the Settlement Agreement or Second Amended DTD to do so. Clause 4.11(iii) of the Second Amended DTD states that PMC can register sale deeds only if the Borrower fails to do so within 5

business days of a written request, but no such request was made.

(iv) Applicant's refusal to sign the cheques presented for payment in compliance of RERA orders. As per Clause 9.3(i) of the Second Amended DTD, the Applicant and Borrower were joint signatories to the Project Operating Account. However, when the Borrower presented cheques for customer repayments in compliance with RERA orders, the Applicant refused to sign, resulting in penalties from the Real Estate Regulatory Authority against the Borrower. The Borrower vide Email dated 09.03.2023, informed the Applicant about transferring funds from the 70% RERA Account to the 30% escrow account for approved contractor and supplier payments. However, in utter disregard to the terms of the Settlement Agreement and Second Amended DTD, the Applicant failed to make any payment to the vendors and contractors, despite multiple reminder emails on 13.03.2023 and 14.03.2023, the Applicant failed to release the payments, violating RERA rules.

(v) Applicant’s ulterior motive to gain control of the entire project by placing its staff permanently on the Project site allegedly to oversee and monitor the development and construction of the Project. Pertinently, the PMC was constituted for the purpose of monitoring the Project. Therefore, there was no need for Applicant to send their men at the Project Site. The representatives of the Applicant at the site only create confusion

and delay works by issuing conflicting instructions to the Borrower's staff carrying out the work.

(vi) Paying exorbitant amounts to vendors and siphoning of funds by Applicant. The Respondent has come to know that Applicant paid exorbitant amounts to vendors and contractors from the Project Revenue Escrow Account without consulting the Borrower, despite being the sole signatory. It is pertinent to mention that it failed to deduct TDS on multiple occasions, exposing the Borrower to penalties. The Borrower raised concerns via email on 08.02.2021, highlighting that the TDS liability would ultimately fall on them despite having no knowledge of these payments. Furthermore, the Borrower requested refunds of excess amounts to customers through emails on 01.05.2023 and 13.05.2023, but the Applicant neither responded nor processed the refunds.

(vii) Failure to circulate any agenda for the Project Monitoring Committee Meeting or take any steps to monitor the project. PMC was constituted with 5 members—3 representing the Applicant on behalf of the Debenture Holders and 2 nominated by the Borrower—to oversee the Project, enhance sales and collections, and ensure its completion. However, after its constitution, the Applicant and its representatives failed to circulate meeting agendas or minutes, despite repeated requests from the Borrower.

(viii) Cancellation of registration of 8 towers by HRERA owing to adamant approach by Applicant in not letting the Borrower appear before the Authority. The Haryana RERA Appellate Authority cancelled the Project registration on account of failure to remove the deficiencies as pointed by the Authority. Had the Promoters of the Borrower Company been allowed to approach the Authority and rectified the defects, such situation would never have occurred. Admittedly, on 28.10.2021, the Borrower had filed an application for extension of registration of the Project. Subsequently, after scrutinizing the Application, the Authority had pointed out certain defects and gave several opportunities to the Promoters of the Borrower Company to remove the defects. However, the Applicant/Debenture Holder prevented the Borrower from appearing before the Authority and failed to coordinate in resolving the issues, as evidenced by the Order dated 18.04.2022. Consequently, the Authority rejected the extension application on 20.03.2023, as the Borrower's promoters were unrepresented in the hearings. The Applicant/Debenture Holder neither rectified the defects nor let the Borrower appeared before the HRERA Authority. In view of such compelling circumstances, the Authority vide Order dated 20.03.2023 rejected the application seeking extension qua the Project on account of failure to remove the defects.

II. The Claim of the Applicant Under Section 7 Petition Emanates from a Settlement Agreement entered between the Applicant, Borrower and the Respondent. The provisions of Insolvency and Bankruptcy Code, 2016 cannot be invoked to seek execution of a settlement agreement. In this regard, it is relevant to place the facts/events before this Hon'ble Tribunal:

(ix) The Applicant was appointed as Trustee to debentures issued in terms of the Debenture Trust Deed dated 19.04.2016 for financing the Project. The Debentures so issued, were subscribed by Kautilya Finance BV.

(x) To raise funds, the Borrower agreed to issue and allot 140 Non-convertible Debentures of face value of INR 1,00,00,000/- (Rupees One Crore only) each, aggregating up to 140,00,00,000/- (Rupees One Hundred and Forty Crores only), in 2 (two) series being Series A - Up to INR 90,00,00,000/(Rupees Ninety Crores only) and Series B - Up to INR Sci,00,00,000 (Rupees Fifty Crore Only) to Debenture Holder.

(xi) Subsequently, the Applicant and the Borrower revised the terms of the Original Debenture Trust Deed (DTD) and executed a Restated and Amended DTD on 27.09.2018. Under this agreement, the Borrower agreed to issue 125 non-convertible debentures, each with a face value of INR 1,00,00,000 (Rupees One Crore), totaling INR 125,00,00,000 (Rupees One Hundred Twenty-Five Crores), divided into three series: Series A (INR

90,00,00,000), Series B (INR 10,00,00,000), and Series C (INR 25,00,00,000).

(xii) To secure the obligations under the Restated and Amended DTD, the Borrower, under Clause 4.6, created securities in favor of the Applicant, including a Corporate Guarantee executed by the Respondent.

(xiii) As per Schedule 2 of the Restated and Amended DTD, the Series A, B, and C Debentures were to be redeemed 72 months after their respective Allotment Dates.

(xiv) In addition to above, the Debentures carried an interest to be paid to the Applicant on quarterly basis. Schedule 14 to the Amended DTD provided for repayment structure of the Interest and principal amount. Significantly, for Series A debentures, interest was to be paid starting from 30.06.2016 till 31.03.2022. Similarly, for Series C Debentures, interest was to be paid from 30.09.2017 till 31.12.2022.

(xv) Pursuant thereto, disputes arose between the Debenture Holder and the Borrower regarding the payment of the Principal Amount and Interest as per Schedule 14 of the Restated and Amended DTD. Consequently, the Applicant, acting on the Debenture Holder's instructions, filed a suit for permanent injunction (CS (COMM) No. 411 of 2019) against the Borrower and its Promoters/Directors.

(xvi) During the pendency of the Suit, the parties decided to amicably settle the disputes. Accordingly, the Borrower and

the Applicant entered into and executed the Settlement Agreement dated 04.11.2019 ("**Settlement Agreement**").

(xvii) The Settlement Agreement was executed between the Applicant and the Borrower to resolve disputes regarding Series A, B, and C Debentures. By executing the Settlement Agreement, the Applicant and the Borrower revised and restructured the repayment schedule of Series A, Series B and Series C Debentures, for which the Applicant has filed the present Section 7 Petition.

(xviii) The Settlement Agreement was executed on 04.11.2019, and on the same day, the Applicant and the Borrower executed the Restated and Amended Debenture Trust Deed ("Second Amended DTD") to incorporate the Settlement Agreement's terms.

(xix) The Borrower also agreed to raise additional funds aggregating to Rs. 30 crores by issuing 30 number of senior, fully secured, redeemable, transferable, interest bearing, nonconvertible debentures of INR 1,00,00,000/- (Rupees One Crore only) each ("Series D Debentures").

(xx) Further, Subject to approvals for acquiring Additional FAR, the Borrower could raise further funds by issuing 8 Series E Debentures, each valued at INR 1,00,00,000, totaling Rs. 8,00,00,000 (Rupees Eight Crore).

(xxi) The Second Amended DTD also stipulated that the representatives of the Applicant shall be the co-signatory to the Project Operating Account.

(xxii) Therefore, the present Section 7 Petition filed by the Applicant is emanating from the Settlement Agreement through which the Applicant and the Borrower revised the repayment schedule and now the Applicant has filed the present Section 7 Petition.

III. The Settlement Agreement cannot be executed under the Insolvency and Bankruptcy Code, 2016.

(xxiii) The Applicant has filed Execution Proceedings before the Hon'ble Delhi High Court to enforce the Settlement Agreement, which also forms the basis of the present Section 7 Petition under the IBC, arising from disputes over Series A, B, and C Debentures.

(xxiv) The Applicant being a decree holder cannot initiate a corporate insolvency process on the basis of alleged default in repayment under the Settlement Agreement.

(xxv) The Applicant's actions, including pursuing execution before the Delhi High Court, reveal its intent to recover amounts rather than resolve insolvency, indicating misuse of the IBC for indirect recovery. It is well-established that the provisions of the IBC are not a recovery mechanism but a tool for insolvency resolution. Section 65 of the IBC applies to

dismiss applications filed for non-insolvency purposes, as in this case.

(xxvi) Applications under the IBC that seek to execute awards or decrees are considered mala fide and liable for dismissal. The conduct of the Applicant in pursuing Execution Proceedings available under the law, in respect of the Settlement Agreement clearly shows that the Applicant itself expects the monies claimed to be recoverable in execution. This is thus not a situation wherein the Applicant has filed the application under the IBC on the bona fide belief that the alleged monies are irrecoverable.

(xxvii) The application clearly having been filed for debt recovery and not for any bona fide resolution of the Respondent or Borrower, the Application is liable to be dismissed on this ground alone. Hence, the present application falls foul of the purposes of the IBC and is liable to be outrightly dismissed.

IV. The Application has been filed with the sole intent to recover Monies from the Respondent.

(xxviii) The Applicant has filed this Petition to cause wrongful loss to the Respondent. Admitting the Petition would exceed the Code's mandate, which aims at resolving insolvency rather than facilitating debt recovery.

(xxix) The Respondent is financially sound, and subjecting it to CIRP would harm stakeholders. The Respondent has also

approached the Applicant with a settlement offer, but the Applicant has not responded.

(xxx) The provisions of IBC are designed to assess a Companies viability early and ensure a time-bound resolution process to preserve its economic value. The Adjudicating Authority has the discretion under Section 7 of the Code to reject the Petition while examining the issues, facts, and objections raised by the Respondent.

(xxxi) The Petition is essentially a dispute between the Applicant and the Borrower, aimed at dragging a solvent company into insolvency proceedings.

(xxxii) The Applicant has separately filed a Section 7 Petition against the Borrower for default in repayment.

(xxxiii) The Applicant has concealed from the Tribunal that while multiple legal proceedings are pending, the Respondent has also claimed losses against the Applicant. A demand notice dated 14.09.2023 has been issued, and the Respondent awaits arbitration under the Settlement Agreement to pursue its claims.

(xxxiv) The Applicant's petition is an abuse of process aimed at harassing the Respondent and Borrower into yielding to undue demands, forcing them to pay more for the current and other projects.

(xxxv) The Borrower has been committed to project completion and timely repayment, but the Applicant's malafide actions have obstructed these efforts. The Applicant's conduct

shows it is not genuinely interested in repayment but intends to harm the Borrower and Respondent for undue gain.

(xxxvi) The Petition should be dismissed as it was filed maliciously to damage the Respondent's reputation and extract money.

V. Demand Certificate was never issued to the Respondent in terms of the Corporate Guarantee.

(xxxvii) The present application under Section 7 of the Code is not maintainable as there is no default by the Respondent under Section 3(12), nor any "debt" due and payable under Section 3(11). It was filed merely to pressure the Respondent without any valid cause of action.

(xxxviii) It is the case of the Applicant that the Respondent herein has executed Corporate Guarantee to secure repayment of the Non- Convertible Debentures **("NCDs")** issued by the Borrower and subscribed to by the Debenture Holder.

(xxxix) The Petition is not maintainable as the Applicant failed to follow the required procedure under the Corporate Guarantees. Specifically, Clause 6.6 which mandates issuing a "Demand Certificate" before seeking repayment, which the Applicant has not done. However, in the present case, the Applicant has failed to issue any demand certificate in terms of Clause 6.6 of the Corporate Guarantees and therefore there is no amount due and payable by the Respondent, as on date. The

relevant clause of the Corporate Guarantee is reproduced herein below for reference: -

> *"6.6 Any demand made under this Guarantee Agreement shall be deemed to have been duly given to the Guarantor by the Trustee, by sending the same substantially in the form of the Demand Certificate annexed at Schedule- I ("Demand Certificate"), by e-mail, or sent by courier, registered post and/ or hand delivery at the address or e-mail id, as provided below, marked for the attention of the person(s) or department specified herein....."*

27. By filing the written submissions, the Applicant espoused/reiterated that: -.

A. On 04.12.2023, Applicant issued invocation-cum-demand certificate to Respondent, invoking the Corporate Guarantee Agreements, demanding payment within a period of 3 days. Admittedly, Respondent did not make the payment of INR 263,00,46,668. Therefore, default occurred on 07.12.2023.

B. As on 23.11.2020, the Corporate Debtor, the Principal Borrower and the promoters acknowledged the defaults in repayment of the outstanding amounts, which is categorical, unequivocal and unqualified admission of both the existence of the ''financial debt" and its "default".

C. Applicant has placed Default Reports from the Information Utility on record, which demonstrates that default occurred on 30.06.2023.

D. The Respondent reliance on the Settlement Agreement dated 04.11.2019 (Settlement Agreement) to suggest that the Applicant had taken over control of the Project through the Project Monitoring Committee (PMC) is entirely misplaced and a deliberate misrepresentation for the following reasons:

a. Clause 2.1 of the Settlement Agreement provides that the PMC shall provide of 5 members comprising of 3 representatives of the Applicant and 2 representatives of the promoters of the Principal Borrower.

b. The promoters of the Principal Borrower were always members of the PMC.

c. Clause 2.6 of the Settlement Agreement itself clarifies that the following activities shall always remain the responsibility of the Respondent, the Principal Borrower and the promoters:

(i) Construction, development, marketing and sale of the Project.

(ii) Repayment of amounts due to the Applicant with respect to the NCDs in accordance with the applicable repayment schedule.

d. Clause 2.22 of the Settlement Agreement further provides that the payment of interest and principal in respect of the NCDs in accordance with the applicable repayment schedule shall always remain the obligation of the Corporate Debtor.

E. After the perusal of Execution Petition (being Ex. P. No.30 of 2023) would itself show that despite the Corporate Debtor, the Principal

Borrower and the promoters agreeing to the formation of the PMC and vesting rights with respect to the construction and development of the Project, under the Settlement Agreement; Respondent deliberately prevented the PMC from performing its functions and prevented the exercise of any rights either by the PMC or the Applicant under the Settlement Agreement.

F. The Orders dated 20.03.2023 passed by the Ld. Haryana Real Estate Regulatory Authority, Gurugram (HARERA) itself holds that the despite 24 opportunities being granted to the promoters and show cause notice issued to them, the promoters refused to appear before the HARERA to comply with the deficiencies with respect to the Project.

G. The NCD Subscriber has rescheduled repayment terms twice since first subscription in 2016 giving fair opportunity to the Parent Company of the Corporate Debtor, the Corporate Debtor and its promoters.

H. Respondent's reliance on a petition filed by it under Section 9 of the Arbitration and Conciliation Act, 1996, which is merely a counter-blast action to the Execution Petition, having been filed on 21.05.2023, 11 days after the filing of the Execution Petition on 10.05.2023. The reliefs claimed in the said petition are directly contrary to the Applicant's rights under the Settlement Agreement.

I. The Applicant submits that both the proceedings before the Hon'ble High Court of Delhi have no bearing on the issue of repayment obligations of the Corporate Guarantor of the "financial debt" in

question. The reliance on these proceedings is deliberately designed to mislead this Hon'ble Tribunal and obfuscate the issues at hand.

J. Hence, the above proceedings have no bearing on the adjudication of the limited question of existence of a "financial debt" and its "default", before this Hon'ble Tribunal - which is established. In view of the above, the Applicant humbly prays that the present petition be allowed and corporate insolvency resolution proceedings be initiated against the Corporate Guarantor/ Santur.

28. By filing the written submissions, the Respondents espoused/reiterated that: -

K. The Applicant is controlling the whole Project of the Respondent. The same is evident from the fact that one of the terms of the Settlement Agreement dated 04.11.2019 and Amended Debenture Trust Deed dated 04.11.2019. PMC has been created to oversee the Project and to take decisions regarding the works. PMC consisted of 5 members with 3 members of the Financial Creditor and 2 members of the Respondent. Thus, the power to take all the decisions were vested with the Applicant being in majority in the PMC. Therefore, PMC was nothing but Applicant only.

L. Applicant is the sole signatory to the Utilization Escrow Account and Project Revenue Escrow Account in terms of the restated and amended Debenture Trust Deed dated 04.11.2019.

M. Applicant orchestrated the “Default” and is in control of the entire Project, it is submitted that the Applicant has not placed on record

any documents in support of its contentions. On the other hand, the Respondent has placed on record correspondence which clearly shows that it is the Applicant who is in control of the entire project and is taking all the decisions on behalf of the Respondent.

N. Further, the Applicant is intentionally not using the amount lying in the escrow account for its repayment purpose owing to which the interest component is mounting day by day which ultimately is increasing the liability of the Respondent. The same is also evident from the fact that vide Email dated 04.03.2023, apprised the Applicant that a sum of Rs 1,70,56,876/84 is lying in the escrow account for their disposal.

O. Execution Petition filed by the Applicant to perpetuate control over the Project. Applicant has filed the Execution proceedings before the Hon'ble Delhi High Court bearing number EX. P. 30 of 2023 ("Execution Petition") (seeking execution of the Settlement Agreement in order to take control of the entire. Some of the reliefs sought by the Financial Creditor in the Execution Petition ((Annexure R-2 of the Reply/Vol. I/Pg. 78) are reproduced hereinbelow for reference:

> *[……]*
>
> *(iii) Permit the representatives of the Decree Holder to represent the Judgment Debtor No. l before all authorities including DTCP, RERA and other authorities;*
>
> *(v) Direct the Judgment Debtor No.1 to appoint the representatives of the Decree Holder as the sole signatory to the any escrow bank accounts of the Judgment Debtor No.1 including for the Additional FAR*

(vi) Restrain the Judgment Debtors from interfering in any manner with the construction, sales of units and collection of monies with respect to the Additional FAR Towers being undertaken by the PMC

P. The Petition is filed with malicious and fraudulent intent and therefore covered under section 65 of the code. The Applicant failed to disclose the pendency of the Execution Petition filed by the Applicant before the Hon'ble High Court, wherein the Applicant has sought execution of the Settlement Agreement and control of the entire Project including but not limited to representation on behalf of the Principal Borrower before all authorities and permission to negotiate with the customers on behalf of the Principal Borrower.

Q. The said Execution Petition was preferred by the Applicant itself. Hence, it is all the more imperative that the Execution Petition be placed before this Hon'ble Tribunal. Infact, the Respondent has also filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi titled as "Shree Vardhman Infraheights Private Limited Vs. IDBI Trusteeship Services Limited & Anr." bearing no. OMP (I) COMM 166 of 2023 to highlight the atrocities and conduct of the Financial Creditor.

R. In addition to above, the Respondent has preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") to refer the disputes for arbitration in terms of Clause 4.4 of the Settlement Agreement ("Section 8 Application").

Materially, part arguments have already been heard by the Hon'ble High Court of Delhi on Section 8 Application.

S. Hence, the very fact that the Applicant had suppressed material fact(s) which has direct bearing on the present proceedings, amounts to playing fraud on this Hon'ble Tribunal and disentitles the Applicant for any relief. It is a settled position of law that a litigant should disclose all the material information and come before the court with clean hands.

ANALYSIS & FINDINGS IN C.P.(IB)/752/2023

29. We have heard the Learned Counsel for the parties and perused the averments made in the Application, Reply and Written submission filed by the parties. Adverting to the facts of the present case, there is no dispute that the Corporate Debtor i.e., Vardhman Infraheights Private Limited is the Principal Borrower in terms of Debenture Trustee Deed dated 19.04.2016, pursuant to which Kautilya Finance BV had disbursed an amount of Rs. 1,250,000,000/- (Rupees One Twenty-Five Crore Only) to the Corporate Debtor. The series of transactions and their dates are herein reproduced below:

Debentures	Amount Subscribed	Date of Disbursement
Series A Debentures	90,00,00,000/-	23.5.2016
Series B Debentures	10,00,00,000/-	31.10.2018
Series C Debentures	25,00,00,000/-	18.8.2017

30. That Kautilya Finance BV subscribed to non- convertible debentures (NCDs) for an amount of INR 1,250,000,000 /- (Rupees One Twenty-Five

Crore Only) each having a face value of INR 1,00,00,000/- of the Corporate Debtor as per the covenants of Debenture Trustee Deed dated 19.04.2016. The Corporate Debtor had failed to make payments as per the Repayment Schedule and kept delaying repayment on one pretext or the other including request for accrual of interest amounts for the quarter ending 30.06.2019, 05.08.2019, 30.06.2020 and 30.09.2020 consequent to which, the debt was restructured on 04.11.2019 and 23.11.2021 as per the Debenture Trustee Deed dated 04.11.2019 and 23.11.2021 respectively.

31. However, even after the revision of repayment schedule, the Corporate Debtor had failed to repay in terms of the fourth and fifth Debenture Trust Deed dated 04.11.2019 and 23.11.2021 from the first due date i.e. 30.06.2019. Consequently, on 01.07.2023 and 26.8.2023 the Applicant sent legal notices under Section 138 of the Negotiable Instrument Act regarding dishonour of cheques, to the SVIPL along with its directors.

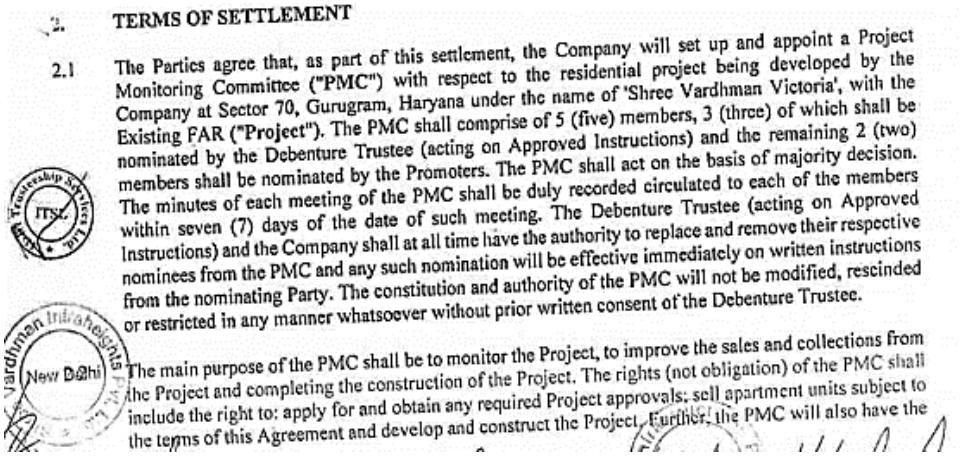
32. The Applicant vide letter dated 27.9.2023 sent a default notice to the SVIPL and Amendment to the Restated and Amended Debenture Trust deed dated 23.11.2021 notifying that the Event of default has occurred in terms of Clause 16.1 of Amendment to the Restated and Amended Debenture Trust deed dated 4.11.2019. The Applicant further informed SVIPL that as on 30.06.2023 an amount of Rs.2,56,56,01,400/- (Rupees Two Hundred Fifty-Six Crores Fifty-Six Lakhs One Thousand Four hundred only).

33. The date of default is clearly stated in part IV as on 30.09.2023. There is no dispute that the Principal borrower has committed default in re-payment of debt. On perusal of document annexed to the Application, it is seen that

the Corporate Debtor was issued an Invocation cum Demand Notice dated 4.12.2023 invoked the Corporate Guarantee provided by the Corporate Debtor in favour of the Applicant under the Corporate Guarantee Agreements dated 27.5.2016, 20.7.2017, 27.9.2018, 4.11.2019 and 11.3.2020 and called upon the Corporate Debtor herein to pay an amount of Rs. 2,63,00,46,668/- (Rupees Two Hundred Sixty-Three Crore Forty-Six Thousand Six Hundred Sixty-Eight only) within 3 days from the receipt of the above said Notice.

34. The Corporate Debtor has made an express admission that it has availed financial assistance from Kautilya Finance BV pursuant to which the Kautilya Finance BV had agreed to disburse an amount of Rs. 1,250,000,000/- (Rupees One Twenty-Five Crore Only) to the Corporate Debtor for the purpose of development, construction and completion of the Project for the purpose of construction and development of the Project.

35. With regard to contention raised on behalf of the Respondent that Applicant is controlling the whole Project of the Borrower by placing reliance on Settlement Agreement dated 04.11.2019. It would not be out of context to refer the provisions of said Agreement. Relevant provisions are extracted below:



2. **TERMS OF SETTLEMENT**

2.1 The Parties agree that, as part of this settlement, the Company will set up and appoint a Project Monitoring Committee ("PMC") with respect to the residential project being developed by the Company at Sector 70, Gurugram, Haryana under the name of 'Shree Vardhman Victoria', with the Existing FAR ("Project"). The PMC shall comprise of 5 (five) members, 3 (three) of which shall be nominated by the Debenture Trustee (acting on Approved Instructions) and the remaining 2 (two) members shall be nominated by the Promoters. The PMC shall act on the basis of majority decision. The minutes of each meeting of the PMC shall be duly recorded circulated to each of the members within seven (7) days of the date of such meeting. The Debenture Trustee (acting on Approved Instructions) and the Company shall at all time have the authority to replace and remove their respective nominees from the PMC and any such nomination will be effective immediately on written instructions from the nominating Party. The constitution and authority of the PMC will not be modified, rescinded or restricted in any manner whatsoever without prior written consent of the Debenture Trustee.

The main purpose of the PMC shall be to monitor the Project, to improve the sales and collections from the Project and completing the construction of the Project. The rights (not obligation) of the PMC shall include the right to: apply for and obtain any required Project approvals; sell apartment units subject to the terms of this Agreement and develop and construct the Project. Further, the PMC will also have the

right (not the obligation) to execute and register builder buyer agreement/ sale deed, as the case may be for Sale of apartments falling in the PMC Inventory, however, PMC shall exercise such right in the event the Company fails to execute or register such required documents within five (5) Business days of written request from the PMC for the same. The PMC would also be entitled to sell any retail units in the Existing FAR of the Project in accordance with the price matrix as may be mutually agreed to between the Company and PMC, at the time of sale of such retail units. It is further clarified that any commercial or institutional area on the Project forming part of the Existing FAR, that may be monetized is within the scope of the PMC and the PMC will sell the units in the said area in accordance with the price matrix as may be mutually agreed to between the Company and PMC, at the time of sale of such units. The PMC shall be authorised to undertake any steps and actions, as may be required to give effect to and achieve its aforesaid authority and purpose. Further, PMC shall, subject to the Applicable Laws, be entitled to take necessary actions and give written directions as are required in respect of the Project to employees, agents, consultants and any other representative and to third parties, including but not limited to sales and marketing agents, real estate brokers, vendors, contractors, service providers, government authorities, as is required for effective exercise of the PMC's rights, purpose and authority as set out herein. The PMC will have full authority, for and on behalf of the Company and its Board, to exercise and undertake and further authorise any persons it deems fit to take any actions as it has been authorised to undertake in terms of the resolutions constituting the PMC.

2.3 The Parties agree that they shall ensure that the PMC shall at all times act in accordance with and in compliance with the terms of this Agreement and Applicable Laws. In case of any criminal actions undertaken by any member of PMC, which are not on basis of any authorisation by the PMC, the liability for such individual criminal actions shall vest solely with such individual member. The Project shall be developed and constructed in compliance with the Applicable Laws.

2.4 The Debenture Trustee (itself and on behalf of the Debenture Holders) shall be entitled to exercise its rights set forth in Clause 16 of the Restated and Amended DTD through the PMC in accordance with the terms set out therein and as supplemented by any other rights in this Agreement. In such event, the PMC shall, subject to Applicable Laws be entitled to take any actions as may be required to enable the Debenture Trustee and Debenture Holders to have full benefit of all remedies as set forth in Clause 16 of the Restated and Amended DTD. Further, in the event of a payment default, the exercise of the rights under Clause 16 of the Restated and Amended DTD by PMC shall not be subject to the restrictions set out herein but shall be subject to Applicable Laws.

2.5 The Company shall pass and deliver to the Debenture Trustee and its nominees on the PMC, copies of such Board resolutions and shareholder's resolutions which will authorise the PMC to exercise the aforesaid rights and allow the PMC to exercise necessary authority and take necessary action in respect of the Project as granted hereunder.

2.6 It is clarified that (i) the responsibility for construction, development, marketing and sale of the Project in accordance with Applicable Laws and (ii) for repayment of the Amounts Due including but not limited to the outstanding and on-going interest and Redemption Amounts of NCDs in accordance with the Revised Repayment Schedules as set forth in this Agreement, is independent of the working of the PMC and is the obligation of the Obligors.

2.22 The payment of Interest and principal in respect of the Debentures and New NCDs pursuant to the applicable Revised Repayment Schedule is the obligation of the Obligors in accordance with the Restated and Amended DTD. The Obligors agree that in the event the Company fails to pay the Interest or principal on or before the scheduled payment date pursuant to Schedule D then it shall be a Payment Default and without any cure period with immediate effect on written notice of the same by the Debenture Trustee to the Company and the terms of the Restated and Amended DTD in case of such default shall apply with immediate effect from date of such notice. The cure periods for any non-payment default shall be as provided in the Restated and Amended DTD.

36. In reference of the aforementioned provisions of the Settlement Agreement dated 04.11.2019, in PMC the Applicant has majority members.

However, it is the established position through reference of provisions of above Agreement that the Corporate Debtor, the Principal Borrower and the promoter's responsibility was to repay the amount due to the Applicant with respect to the NCD's in accordance with applicable repayment schedule as agreed between the Applicant and Respondents. Hence, the plea raised by Respondent with respect to control of project is not tenable.

37. With regard to contention raised on behalf of the Respondent that Applicant is the sole signatory to the escrow accounts of the Project and was responsible for mismanagement of the Principal Borrower's finances., a similar issue was dealt by this Tribunal in ***Orbis Trusteeship Services Pvt. Ltd. vs. Nobal Buildtech Pvt. Ltd. (CP (IB) No. 143/(ND)/2022),*** where the application filed under Section 7 of the Code against the Principal Borrower was admitted. Relevant excerpt of the order dated 05.11.2024 reads thus: -

> "*32. It could also be one of the contentions raised on behalf of the Respondent that the Debenture Holder and the Applicant were in control and management of the finances as well as affairs of the Principal Borrower and that such control led to mismanagement of the Principal Borrower's finances. In this regard, it is relevant to refer to the order dated 11.09.2024 passed by this court in IB-541/ND/2022 where the application filed under Section 7 of the Code against the Principal Borrower was admitted. In passing the said order, this court had rejected the plea raised by the Principal Borrower that the default in debt could not be attributed to it since it was the Applicant/ Debenture Trustee which operated the escrow account. Relevant excerpt of the order dated 11.09.2024 reads thus: -*
>
> *"17. Having drawn our attention to Exhibit-34 to Rejoinder i.e Escrow Account Agreement, the Ld. Counsel for the Corporate Debtor submitted that since in terms of Clause 3.2 of the Agreement, it was the Applicant*

i.e. Debenture Trustee who was operating the escrow account, the default occurred in redeeming non-convertible debentures cannot be attributed to the Respondent/CD. The Clause 3.2 relied upon by him reads thus: -

"3.2 Operation of the Escrow Accounts

(a) Each of KIPL, GPPL, and NBPL hereby unconditionally and irrevocably delegates to the Escrow Agent the authority to operate the Escrow Accounts in accordance with the terms of this Agreement, Applicable Law, and in accordance with the instructions of the Debenture Trustee (acting at all times in accordance with the Transaction Documents). It is hereby clarified that each of the RERA Designated Accounts shall be operated in accordance with the terms of this Agreement and the RERA Act. Save as provided for in this Agreement and in the RERA Act no Person shall be entitled to issue instructions in relation to any of the RERA Designated Accounts.

(b) All transfers from the Escrow Accounts shall be made by the Escrow Agent in India only and the Escrow Agent is not permitted to make any transfers from the Escrow Account in any other jurisdiction, unless such transfer to another jurisdiction is permitted by Applicable Law. Nothwithstanding anything contained in this Agreement, in the event any instruction or directions received by the Escrow Agent from the Uttar Pradesh Real Estate Regulatory Authority pertaining to any of the RERA Designated Accounts, such instruction or direction issued by the Uttar Pradesh Real Estate Regulatory Authority shall prevail over any conflicting instructions provided by the Promoter. The Escrow Agent shall promptly, a having received any such instruction or direction from the Uttar Pradesh Real Estate Regulatory Authority, inform the Debenture Trustee and the Promoter of such instruction or direction.

(c) The Promoters shall only be entitled to issue instructions to the Escrow Agent in relation to the RERA Designated Accounts and for the limited purpose of transferring any and all sums of money from the RERA Designated Accounts to the corresponding Debenture Trustee Escrow

Account. Any such. instruction issued by any Promoter shall be in the format as set out in Schedule III hereto and shall mandatorily be accompanied by (i) a certificate in the format as prescribed under the RERA Act from the project engineer of the specific RERA Project: (ii) a certificate in the format as prescribed under the RERA Act from the project architect of the specific RERA Project; and (iii) a certificate in the format as prescribed under the RERA Act from the chartered account of the specific RERA Project. It is clarified that any sum of money withdrawn from any RERA Designated Account shall mandatorily be transferred to the corresponding Debenture Trustee Escrow Account only.

(d) It is clarified that neither the Promoters nor any of their Affiliates will be permitted to issue any instructions or operate in any manner whatsoever the Debenture Trustee Escrow Accounts or the Collection Escrow Accounts. Any transfer of sums from the Collection Escrow Accounts to the corresponding RERA Designated Account and the corresponding Debenture Trustee Escrow Account will strictly be in accordance with this Agreement and Schedule II hereto. Any transfer of sums from the Debenture Trustee Escrow Accounts will strictly be in accordance with the instructions issued solely by the Debenture Trustee (acting at all times in accordance with the Transaction Documents) to the Escrow Agent.

(e) Prior to the occurrence of an Event of Default, the names of the authorised signatories of each of KIPL, GPPL, and NBPL for the sole purpose of issuing instructions in relation to withdrawal of sums from the RERA Designated Accounts to the corresponding Debenture Trustee Escrow Account and their specimen signatures for the purpose of standing instructions, notices and other related instructions to the Account Bank or to the Escrow Agent for this limited purpose shall be in accordance with the resolutions passed by the board of directors of each of the Promoters and annexed to this Agreement hereto.

Notwithstanding anything to the contrary stated in this Agreement, upon the occurrence of an Event of Default under the Debenture Trust Deed, in case of each of the RERA Designated Accounts, the Account Bank shall, immediately upon being informed of the occurrence of any such Event of Default by the Debenture Trustee (acting at all times in accordance with the terms of the Transaction Documents) and after having received a board resolution passed by the respective Promoter in this regard, revoke the authority granted to the existing signatories of each of KIPL, GPPL, and NBPL under Clause 3.2(e) above. On and from the occurrence of an Event of Default, each of the RERA Designated Accounts shall be operated solely by such director or key managerial personnel of the Promoter that is in accordance with the Transaction Documents, and each Promoter undertakes to submit a board resolution to the Account Bank and to the Escrow Agent in this regard. The signatory of each of the Promoters authorised to operate the RERA Designated Accounts upon the occurrence of an event of default and thereafter shall issue instructions substantially in the form set out in Schedule III hereto. On and from the occurrence of an Event of Default, the Escrow Agent and the Account Bank shall act on the sole instruction of only the authorised signatory of the Promoters so specified in the board resolutions passed by the Promoters upon the occurrence of an Event of Default, and the Escrow Agent and the Account Bank, shall in no way be bound by or act as per any other instructions received from any other Person, including any other signatory of KIPL, GPPL or NBPL, their Affiliates or their authorised representatives.

(f) The name of the authorised signatory of the Debenture Trustee for the purpose Debenture of issuing instructions in relation to withdrawal of sums from each of the Debenture Trustee Escrow Accounts and his specimen signature for the purpose of standing instructions, notices and other related instructions to the Account Bank or to the Escrow Agent shall be in accordance with the resolution passed by the Debenture Trustee and annexed to this Agreement hereto.

(g) The Debenture Trustee and the Promoters undertake to give the Escrow Agent. 5 (five) clear Business Days' notice in writing of any change to their authorised signatories.

(h) Amounts shall only be withdrawn from the Escrow Accounts to the extent such withdrawal does not cause any of the Escrow Accounts to have a negative balance and the Account Bank shall not have any obligation to monitor any of the Escrow Accounts for this purpose or incur any liability whatsoever from any non-distribution in such circumstances. Notwithstanding the above, the Account Bank shall be liable in an event of wilful default, gross negligence. and fraud.

(i) Upon the receipt of an occupancy certificate in relation to the Sikkd Kaamna Project, the Account Bank shall. and the Escrow Agent shall procure that the Account Bank does, transfer all funds lying, from time to time, to the credit of the KIPL RERA Designated Account and the KIPL Collection Escrow Account to the KIPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bank and the Escrow Agent shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the KIPL RERA Designated Account and the KIPL Collection Escrow Account to the KIPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from KIPL and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close the KIPL RERA Designated Account only. It is hereby clarified that upon the closure of the KIPL RERA Designated Account. all amounts lying, from time to time, to the credit of the KIPL Collection Escrow Account shall be transferred only to the KIPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement.

(j) Upon the receipt of an occupancy certificate in relation to the Sikka Karmic Project, the Account Bank shall, and the Escrow Agent shall procure that the Bank does, transfer all funds lying, from time to time, to the credit of the GGPL RERA Designated Account and the GPPL Collection Escrow Account to the GPPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bonk and the Escrow Agent shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the GPPL RERA Designated Account and the GPPL Collection Escrow Account to the GPPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from GPPL, and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close the GPPL RERA Designated Account only. It is hereby clarified that upon the closure of the GPPL RERA Designated Account, all amounts lying, from time to time, to the credit of the GPPL Collection Escrow Account shall be transferred only to the GPPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement.

(k) Upon the receipt of an occupancy certificate in relation to the Sikka Kirat Project, the Account Bank shall, and the Escrow Agent shall procure that the Account Bank does, transfer all funds lying, from time to time, to the credit of the NBPL RERA Designated Account and the NBPL Collection Escrow Account to the NBPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bank and the Escrow Agent shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the NBPL RERA Designated Account and the

NBPL Collection Escrow Account to the NBPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from NBPL, and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close the NBPL RERA Designated Account only. It is hereby clarified that upon the closure of the NBPL RERA Designated Account, all amounts lying, from time to time, to the credit of the NBPL Collection Escrow Account shall be transferred only to the NBPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement."

"18. In terms of the aforementioned clause, the power to operate escrow account was given to some agent nominated by the Applicant, but merely because certain person nominated by the bankruptcy trustee is authorised to operate the account, it cannot be said that there is no default on behalf of the Corporate Debtor as it is not the case of the Corporate Debtor that there was sufficient amount available in the account to redeem the debentures on due dates. Thus, we do not find any force in the plea on behalf of the Corporate Debtor that merely because the Applicant was allowed to nominate a person to operate the escrow account, the present application is not maintainable for the reasons that the operator of account could not make the payment."

33. In terms of the aforesaid order of this court, the contention raised by the CD that the default in repayment occurred to mismanagement on the part of the Applicant in managing the finances of the Principal Borrower is not tenable."

38. In term of the aforesaid order of this tribunal, the contention raised by Respondent that Applicant is the sole signatory to the escrow accounts of the Project and mismanagement of the Principal Borrower's finances is not tenable.

39. The Respondent has also raised contention regarding Execution Petition being filed by the Applicant to maintain the Control over the project, the present petition vitiated being filed with malicious and fraudulent intent and reliance is placed on ***Anita Jindal vs. M/s Jindal Buildtech Pvt. Ltd***., Company Appeal (At) (Insolvency) No. 512 Of 2021, wherein Hon'ble NCLAT has set aside the CIRP on the ground that the same was filed with a malicious intent under Section 65 of the Code. Further Respondent contented that the applicant is guilty of suppressing material facts from this Hon'ble Tribunal.

40. Considering the submissions made and documents placed on record. It would not be out of context to make a reference to to provisions of Section 5(8)(c) of IBC, 2016 which provides that any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument would constitute financial debt. The Clause reads thus:

> *"**5. Definitions.—***
>
> *.....*
>
> *(8) financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
>
> *..... (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;"*

41. The Section 5(8) provides that the financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. We find that in the present case, the trust deed provided for

interest payable on the amount of consideration of non-convertible debentures.

42. Here it would not be out of context to mention that there are multiple financial transactions between the Debenture Holders and the Corporate Debtor and anything observed by us hereinabove would not reflect on the exact amount of NCD. What we are concerned about in the present proceedings is the threshold limit of amount of default which is mentioned at Rs. 1 crore in Section 4 of IBC, 2016. In any case, we consider it appropriate to refer Part-IV of the application preferred by the Applicant where the default amount is more than the prescribed threshold limit.

43. Furthermore, we may also 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."*

44. As regard to the Respondent's reliance on Hon'ble Supreme Court judgement in the matter of ***Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352*** ("Vidarbha Industries"). It is observed that the facts of the case relied upon and the facts of the present case are different. Accordingly, the judgement relied upon by the Corporate Debtor is not helpful.

45. The Applicant has placed his reliance on various judicial pronouncement, in the case of ***Innoventive Industries Limited vs ICICI Bank Ltd (2018) 1 sec 407***, had observed the scope and extent of the powers conferred with the Adjudicating Authority under Section 7.

> *"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*
>
> *"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when*

this is proved· to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

46. With respect to information utility reports, the Applicant has placed his reliance on ***Hon'ble NCLAT in Vipul Himatlal Shah & Anr. v. Teco Industries, 2022 OnLine NCLAT 209,*** wherein it was held that when the records of the Information Utility show that there is a debt which is in default, the Ld. NCLT, is not required to examine the issue of debt and default any further and proceed with initiation of corporate insolvency resolution process against the corporate debtor.

47. Further in ***M. Suresh Kumar Reddy V. Canara Bank, (2023) 8SCC 387*** it was held that once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse the admission of the application under Section 7. The relevant extract of the aforesaid judgement is reproduced below: -

"11. Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. "Default" is defined under sub-section (12) of Section 3 IBC which reads thus:

"3. Definitions. In this Code, unless the context otherwise requires-

.....

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;"

Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a corporate debtor. In such a case, an order of admission under Section 7 IBC must follow. If NCLT

finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application."

48. 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"

49. In any case, since a separate application for commencement of IRP qua the PB was pending, for sometime the parties sought adjournments in the present proceedings to await the outcome of the same. However, on 13.02.2025, the counsels for the parties conceded that in view of the admission of the application preferred qua the PB, nothing further remains to be argued in the present application and the application has to be admitted. The relevant excerpt of the order passed by the Principal Bench qua the Principal Borrower reads thus: -

*"**6. ORDER***

***1.** In light of the above facts and circumstances, it is hereby ordered as follows: -*

***i.** The Application bearing (**IB)–751PB)/2023** filed by the Applicant under Section 7 of the Insolvency & Bankruptcy*

Code, 2016 for initiating CIRP against CD i.e. ***M/s Shree Vardhman Infraheights Private Limited*** *is hereby* ***ADMITTED****.*

ii. *As a consequence of the Application being admitted in terms of Section 7 of the Code, the moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.*

iii. *The Financial Creditor has proposed the name of* ***M/s Ducturus Resolution Professionals Pvt. Ltd. through its Director Mr. Jalesh Kumar Grover*** *registration number IBBI/IPA-001/IPP00200/2017- 2018/10390, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration annexed as* ***Annexure-2 (pg. 6 to 12)*** *of IA 1527/2024.*

iv. M/s Ducturus Resolution Professionals Pvt. Ltd. through its Director Mr. *Jalesh Kumar Grover; Registration number* ***IBBI/IPA001/IPP00200/2017-2018/10390****; Address: SCO 818 1st Floor NAC Manimajra Chandigarh; Email id* ***j.kgrover27@gamil.com****;Contact No.* ***9501018808*** *is appointed as the Interim Resolution Professional ("IRP").*

v. *In pursuance of Section 13(2) of the Code, we direct the IRP to make a public announcement immediately with regard to the admission of this application under Section 7*

of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

vi. *During the CIRP period, the management of the CD shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no further opportunity given in this regard.*

vii. *The IRP is expected to take full charge of the CD's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.*

viii. *The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the CD.*

ix. *The Applicant shall deposit a sum of Rs 5,00,000/- (Rupees Five Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors ("COC").*

x. *The Registry is hereby directed to communicate a copy of the order to the FC, the CD, the IRP and the Registrar of Companies, NCR, New Delhi, by Speed Post and by email, at the earliest but not later than seven days from today, and upload the same on website immediately after pronouncement of the order. The Registrar of Companies*

shall update his website by updating the status of the CD and specific mention regarding admission of this petition must be notified.

7. *The registry is further directed to send the copy of the order to the IBBI also for their record.*

8. *Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.*

9. *List the matter on* ***10.02.2025****."*

50. The order was assailed before the Hon'ble NCLAT and the challenge was nixed. Relevant excerpt of the order of Hon'ble NCLAT reads thus: -

"18. Counsel for the Respondent is right in his submission that in Section 7 application the Adjudicating Authority was obliged to determine whether default has occurred or whether debt was due as remained unpaid. The Hon'ble Supreme Court in "E.S. Krishnamurthy and Others vs. Bharath Hi-Tech Builders Private Limited- (2022) 3 SCC 161" referring to the earlier judgment of the Hon'ble Supreme Court in "Innoventive Industries Ltd. vs. ICICI Bank- (2018) 1 SCC 407" held following in paragraph 32:-

"32. In Innoventive Industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, paras 28 and 30 : (2018) 1 SCC (Civ) 356] , a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine whether a "default" has occurred i.e. 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. Speaking through Rohinton F. Nariman, J., the Court has observed : (SCC pp. 438-39, paras 28 & 30)

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation

to Section 7(1), a default is in respect of a financial debt owed to [Ed. : The word between two asterisks has been emphasised in original.] any [Ed. : The word between two asterisks has been emphasised in original.] financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt ma not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in

which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

** * **

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(emphasis supplied)

19. Subsequent judgment of the Hon'ble Supreme Court in "M. Suresh Kumar Reddy vs. Canara Bank and Ors.-(2023) 8 SCC 387" also decode the same proposition. It is useful to extract paragraph 11 of the judgment which is as follows:-

"11. Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. "Default" is defined under sub-section (12) of Section 3 IBC which reads thus:

*"3. Definitions.—In this Code, unless the context otherwise requires— * * **

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

20. Counsel for the Appellant has also referred to the proceedings initiated by the financial creditor at Delhi High Court for execution of the Settlement Agreement as well as proceedings initiated for arbitration by the corporate debtor in the Delhi High Court. It is well settled proposition that any dispute even pending in the arbitration does not in any manner prohibit the financial creditor to take remedy under Section 7. Counsel for the Appellant has much emphasised on the fact that the financial creditor has proceeded and utilised the amount for construction with respect to additional FAR towers. The Financial Creditors role was construction and monitoring of the project was only as per PMC constituted. As per the Settlement Agreement dated 04.11.2019, any action taken by the PMC through its members consisting of nominees of the financial creditor can have no consequence or effect on the obligation and liabilities of the obligor to fulfil their obligation of repayment. Adjudicating Authority in the impugned order after considering the submissions of the parties has returned the findings that debt and default has been proved. In paragraph 5(x), following was held:-

"x. Therefore, on the basis of arguments advanced and documents on record, the DSA and DTD as amended on 04.11.2019 and 23.11.2021 shall stand as valid and enforceable. That is the underlying factor for the debt and default that remains unpaid. All other interim arrangements basis court proceedings in multiple

forums does not vanquish the debt. It lends credence to the continuing default and attempt to extricate but in vain. There are other additional documents like emails."

21. We do not find any infirmity in the findings returned by the Adjudicating Authority that the financial creditor succeeded in proving the debt and default and the ingredients under Section 7 are fulfilled. In view of the facts brought on the record, it is clearly proved that there is a debt and default which has been acknowledged from time to time by the corporate debtor. Corporate debtor has failed to honour its repayment obligations as per financial document. Adjudicating Authority after considering all submissions of the parties have rightly returned the finding of debt and default.

22. In view of the foregoing conclusions and discussions, we are of the view that no ground has been made out to interfere with the impugned order dated 08.01.2025 passed by the Adjudicating Authority admitting Section 7 application. There is no merit in the appeal. The Appeal is dismissed."

51. After perusal of submissions and documents placed on record, we are satisfied that the present Application is complete in all respects and the Financial Creditor is entitled to claim its outstanding financial debt from the Corporate Debtor and that there has been default in payment of the Financial Debt. Therefore, on the basis of discussion in the aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant is entitled to move the application against the Corporate Debtor in view of outstanding Financial Debt in default which is above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. Nevertheless, in the wake of the order passed in respect of the Principal Borrower initiating the CIRP qua it and the order being upheld by the Hon'ble NCLAT, Ms. Pooja

Sehgal, Ld. Senior Counsel for the CD submitted that she is left with no scope to oppose the admission and the captioned application has to be admitted. In view of the aforementioned, we are left with no option but to **admit the present petition.** Ordered accordingly.

52. **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.

IA. NO. 1530/ND/2024

53. The instant Interlocutory Application (I.A.(IBC) No. 1530/2024) is preferred by IDBI Trusteeship Services Limited ('Applicant') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 inter-alia seeking to replace the name of the proposed Interim Resolution Professional from the name of Mr. Harvinder Singh having IBBI Regd. No. I88I/IPA-001/IP-P00463/2017-2018/10806 and propose the name of M/s Ducturus Resolution Professionals Pvt. Ltd. through its Director Mr. Jalesh Kumar Grover having registration No. I88I/IPA-001 /IP-P00200/2017- 2018/10390. Heard and record perused. This Adjudicating Authority in the interest of justice, hereby **allow the present application (I.A/ 1530/2024)** and the revised Part-III of the Captioned Company Application.

54. Accordingly, we appoint M/s Ducturus Resolution Professionals Pvt. Ltd. through its Director Mr. Jalesh Kumar Grover having registration No. I88I/IPA-001 /IP-P00200/2017- 2018/10390 and Email ID: j.kgrover27@gamil.com is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against said IRP and disclosures as required under IBBI Regulations, 2016 are made by said IPP within a period of one week from this Order. It is further ordered that M/s Ducturus Resolution Professionals Pvt. Ltd. through its Director Mr. Jalesh Kumar Grover 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 of Corporate Persons) Regulations, 2016.

55. The Applicant 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.

56. 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.

57. 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.

IA. NO. 1430/ND/2024

58. The instant Interlocutory Application [I.A.(IBC) No. 1430/2024] is preferred by Santur Infrastructures Pvt. Ltd ('Applicant') under Rule 11 of the National Company Law Tribunal Rules, 2016 inter-alia seeking the following relief(s):-

> *(i) Allow the present Application and take on record the additional facts and documents filed along with the instant Application; or*
> *(ii) Pass such other order(s), directions(s), relief(s) as deemed fit and proper by this Hon'ble Tribunal in the fact and circumstances of the present case and in the interest of justice.*

59. Briefly stated, the facts of the present case as averred by the applicant are that the documents which are sought to be placed on record vide the instant application were not in existence at the time when the arguments were

advanced by the parties and the matter was reserved for orders. The plea espoused in the captioned application is for taking on record the additional documents with respect to the Principal Borrower, on without prejudice basis, has offered to pay a sum of Rs. 82 Crores (Approx.) to the Debenture Holder towards its alleged outstanding debt. However, the Debenture Holder vide Email dated 13.02.2024 has refused to accept any amount from the Principal Borrower and instead is more interested in waiting for the outcome of the present petition. In view of the order passed in IB-752/ND/2024, the application has become infructuous and is disposed of accordingly.

IA. NO. 3855/ND/2024

60. The instant Interlocutory Application [I.A.(IBC) No. 3855/2024] is preferred by IDBI Trusteeship Services Limited ('Applicant') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 inter-alia seeking the following relief(s):

> *"A. restrain the Corporate Debtor from alienating, encumbering, or creating any third-party interest on the assets of the Corporate Debtor;*
>
> *B. restrain the Corporate Debtor to carry out Project Related Financial transaction (sales, collections and cancellation) out of any Bank Account other than the agreed Escrow Accounts and in terms of the DTD dated 19.04.2016, Amended DTD dated 27.09.2018, Third DTD dated 04.11.2019. and Amended Third DTD dated 23.11.2021;*
>
> *C. appoint an Interim Resolution Professional (IRP) to monitor and control the affairs of the Corporate Debtor;*

D. pass such orders, as this Hon'ble Tribunal deems fit and proper in the circumstances of the case and thus render justice."

61. In view of the order passed in IB-752/ND/2024, the application has become infructuous and is disposed of accordingly.

Sd/-
(CHARANJEET SINGH GULATI)
MEMBER (T)

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