NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 127 of 2023
& I.A. No. 463 of 2023

[Arising out of Order dated 21.10.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench VI in CP IB-682/(ND)/2021]

In the matter of:

Mist Avenue Pvt. Ltd. **...Appellant**

Vs.

Nitin Batra & Ors. **...Respondents**

For Appellant: **Mr. Dhruv Goel, Advocate**

For Respondents: **Mr. Sahil Sethi, Mr. Samriddh Bindal and Mr. Vikash Kumar, Advocates.**

Company Appeal (AT) (Insolvency) No. 1478 of 2022

[Arising out of Order dated 21.10.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench VI in CP IB-682/(ND)/2021]

In the matter of:

Mist Direct Sales Pvt. Ltd. **...Appellant**

Vs.

Nitin Batra & Ors **...Respondents**

For Appellant: **Mr. Krishnendu Datta, Sr. Advocate with Mr. NPS Chawla, Mr. Surekh Kant Baxy, Ms. Mahima Shekhawat, Mr. Rahul, Advocates**

For Respondents: **Mr. Sahil Sethi, Mr. Samriddh Bindal and Mr. Vikash Kumar, Advocates.**

Company Appeal (AT) (Insolvency) No. 1506 of 2022
& I.A. No. 4895 of 2022

[Arising out of Order dated 21.10.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench VI in CP IB-682/(ND)/2021]

In the matter of:

Anand Infoedge Pvt. Ltd. **...Appellant**

Vs.

Nitin Batra & Ors **...Respondents**

For Appellant: **Mr. Abhijeet Sinha, Mr. Apoorv Agarwal, Ms. Vaishnavi Prakash, Advocates.**

For Respondents: **Mr. Sahil Sethi, Mr. Samriddh Bindal and Mr. Vikash Kumar, Advocates.**

J U D G M E N T
(17th November, 2023)

Ashok Bhushan, J.

1. These three Appeals have been filed challenging the same order dated 21.10.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench-VI, by which order the Adjudicating Authority held Application under Section 7 filed by Mr. Nitin Batra and Others, Respondents herein under Section 7 of the IBC as maintainable. Aggrieved by the said order, these three Appeals have been filed by the Appellants who were Respondents in Section 7 Application filed by the allottees of a Real Estate Project.

2. Brief facts of the case necessary to be noticed for deciding these Appeals are:-

2.1. The Appellant in Company Appeal (AT) (Insolvency) No. 1506 of 2022 i.e. 'Anand Infoedge Pvt. Ltd.' was allotted land measuring 100,980 sq. mtrs. bearing Plot No.1, Sector 143 Noida by the New Okhla Industrial Development Authority by Lease Deed dated 21.08.2008. 'Anand Infoedge Pvt. Ltd.' was given possession on 28.08.2008. 'Anand Infoedge Pvt. Ltd.', the lessee of the land entered into Collaboration Agreement with 'M/s. Mist Avenue Private Limited', the Appellant in Company Appeal (AT) (Insolvency) No. 1478 of 2022 (hereinafter referred to as "Mist Avenue") w.e.f. 26.10.2012 for development of the project land. 'Mist Avenue', who under the Collaboration Agreement was given right of the development with 85% share in the land allotted various units in the project between the year 2012 to 2017. The Respondents to this Appeal were allottees of the different units in the project and in pursuance of the allotment i.e. Builder Buyer's Agreement, various payments were made to the Respondents allottees to the 'Mist Avenue'. On 27.07.2017, 'Anand Infoedge Pvt. Ltd.' entered into another Collaboration Agreement with 'M/s. Mist Direct Sales Private Limited' (hereinafter referred to as "Mist Direct"). In spite of 2nd Collaboration Agreement, the project could not be completed. The UPRERA has also revoked the registration of the project vide its order dated 07.12.2019. On 11.10.2021, an application under Section 7 was filed by Mr. Nitin Batra and Ors. who were allottees of 115 units in the project. A joint Section 7 Application was filed to initiate CIRP against three Respondents

namely— (i) 'Anand Infoedge Pvt. Ltd.' (ii) 'M/s. Mist Avenue Private Limited' and (iii) 'M/s. Mist Direct Sales Private Limited'. Applicants pleaded that the project is being developed by all the Respondents under Collaboration Agreements and a joint Insolvency Resolution Process be initiated against all the three Corporate Debtors. It was further pleaded that the Corporate Debtor No.1 'Anand Infoedge Pvt. Ltd.' holds 99.99% shares in 'Mist Direct'. In Section 7 Application, reply was filed by all the three Respondents who are Appellants before us. In the Reply, objection was raised by the Appellants that Section 7 Application filed by the allottees of units is not maintainable. The Appellant- 'Anand Infoedge Pvt. Ltd.' objected to maintainability of the petition against three Corporate Debtors. It was pleaded that the Appellant 'Anand Infoedge Pvt. Ltd.' has not signed or executed agreement with allottees. All the Respondents-Corporate Debtors had independent entities having independent directors and the shareholding of Appellant- 'Anand Infoedge Pvt. Ltd.' in 'Mist Direct' was transferred two years ago. 'Mist Direct' has no connection with 'Anand Infoedge Pvt. Ltd.'. Appellant- 'Mist Avenue' pleaded that the Collaboration Agreement entered with 'Anand Infoedge Pvt. Ltd.' was cancelled on 27.07.2017 and 'Anand Infoedge Pvt. Ltd.' has already entered into separate Collaboration Agreement with 'Mist Direct' and the allottees have been duly informed by 'Mist Direct', hence, the Applicants (allottees) have no right to raise any objections against 'Mist Avenue'. The RERA registration permission to construct and other rights and obligations are solely with 'Mist Direct' and not with 'Mist Avenue', hence, the application under Section 7 was not

maintainable. It was contended on behalf of 'Mist Direct' that their application as initially stated to have been filed by 143 allottees/ Financial Creditors. Applicants have numbered joint allottees separate Financial Creditor so as to increase the number of Financial Creditors. In fact, the application was filed only by allottees of 115 units. It was pleaded that five allottees have settled their claims, hence, due to extinguishment of outstanding claim they are not Financial Creditors. It was further pleaded that 11 claims were barred by Section 10A and could not have been filed or entertained. Large number of claims of Appellants were barred by limitation. One claimant Mr. Yarmohammad was disqualified since he has not made the entire payment. The threshold as prescribed under Section 7 of the IBC being not fulfilled, application was not maintainable and deserves to be rejected. Date of default being mentioned as 16.10.2016 and subsequent dates on which possession was to be delivered as per agreement. Applications were barred by time. Adjudicating Authority heard the submissions of the Applicants as well as Respondents and by impugned order dated 21.10.2022 held the application maintainable and directed the application to be listed for hearing on 10.11.2022. Appellants aggrieved by the said order has come up in this Appeal.

3. We have heard Shri Abhijeet Sinha, Learned Counsel appearing for Appellant- 'Anand Infoedge Pvt. Ltd.', Shri Krishnendu Datta, Learned Senior Counsel appearing for the Appellant- 'Mist Direct'. We have also heard Counsel for the Appellant for 'Mist Avenue' and Shri Sahil Sethi and Shri Samriddh Bindal, Learned Counsel for the Respondents- Allottees.

4. Shri Abhijeet Sinha, Learned Counsel appearing for the Appellant- 'Anand Infoedge Pvt. Ltd.' submits that the joint application filed by the allottees against three Appellants were not maintainable. All three Respondents to the Section 7 Application were separate corporate entities although joint application has been filed by the Applicants but there is no occasion to join the different companies as Respondents. Adjudicating Authority erred in overruling the objection of the Appellants. Adjudicating Authority has no jurisdiction to consolidate the process of insolvency of three separate companies at the stage of admission of the petition. Adjudicating Authority cannot initiate proceedings against three parties simultaneously when the debt is due against the one party and the default is done by another company. Applicants failed to prove any relationship existing between the Appellant Companies and the Applicants as Corporate Debtor- Financial Creditor relationship. The Appellant Company had not been party to the Builder Buyers' Agreement signed by the allottees with developer, hence, in the absence of any financial debt being due and payable the Appellant could not have been impleaded in application. In the present case, there was no transaction entered between the parties i.e. Appellant Companies and allottees. There was no commercial effect of borrowing between them, hence, there was no financial debt. There is no principal agent relationship between the parties and the application suffers from misjoinder of the parties. The Adjudicating Authority erred in consolidated the companies as three companies which do not pass any test mentioned by

this Appellate Tribunal in case of ***"Radico Khaitan Ltd. vs. BT & FC Pvt. Ltd.- Company Appeal (AT) (Ins.) No.919 of 2020"***

5. Shri Krishnendu Dutta, Learned Senior Counsel appearing for 'Mist Direct' submits that the application filed by allottees did not fulfil the threshold as prescribed under Section 7. Application was not filed by 100 allottees although there were 115 unit holders who have filed the application but the claims of large number of applicants was not valid claim nor they could have been part of the application. Shri Krishnendu Dutta elaborating his submission submits that the claims of 18 applicants were barred by limitation whereas claims of 11 allottees were barred by under Section 10A since default has occurred during 10A period. Claims of eight allottees were settled, hence, could not be part of application. Claims of three allottees were premature. In view of the above number of allottees who could not have joined the application, the threshold of 100 of allottees was not fulfilled and the application was liable to be dismissed on this ground alone. It is submitted that the Adjudicating Authority committed error in rejecting the application in holding that the application is maintainable whereas application deserves to be rejected. It is submitted that all the applicants who are party to the joint application ought to fulfil the eligibility of an allottee i.e. who fulfil the event of default and the application by them within the limitation and does not suffer from any error.

6. Learned Counsel appearing for the 'Mist Avenue' submits that the development agreement with 'Mist Avenue' having been cancelled on

27.07.2017 they have no obligation towards the allottees. 'Mist Avenue' having unnecessarily made party to the Section 7 Application defaults occurring during the period between 25.03.2020 to 24.03.2021 are barred by Section 10A. The Adjudicating Authority did not compute the minimum threshold requirement as per the law. The Adjudicating Authority without going into merits of the case has held that default has occurred, 103 claims held to be valid. Adjudicating Authority failed to consider that the RERA registration permission to construct and other aligned rights and obligations are solely with 'Mist Direct' and not with 'Mist Avenue'.

7. Learned Counsel appearing for the Respondents-allottees refuting the submission of the Counsel for the Appellant contends that the Adjudicating Authority has rightly overruled the objection raised by the Appellant regarding maintainability of the application. It is submitted that all the three Appellants who were Respondents in Section 7 Application are inter-connected and were jointly developing the project, hence, insolvency application filed by them jointly is fully maintainable. The project cannot be developed if any one of the Respondents is not before the Court. The interest of the homebuyers can only be protected if all the Appellants are party to the Insolvency Resolution Process. It is submitted that Section 7 Application fulfils the threshold as prescribed by Section 7 of the IBC. It is not necessary for all applicants who have joined in application should have claim of more than Rupees One Crore and their claims should be all within time. It is submitted that if claim of any of the Appellant or other Financial Creditors is more than Rupees One Crore and is within time, the Application is fully

maintainable. Learned Counsel for the Respondents has relied on the judgment of the Hon'ble Supreme Court in ***"Manish Kumar vs. Union of India & Anr.- 2021 SCC OnLine SC 30"*** and submits that the issue has been settled.

8. We have considered the submissions of the Counsel for the parties and perused the record.

9. Three main questions which arise for consideration in this Appeal are:-

(i) Whether the joint application under Section 7 against 'Anand Infoedge Pvt. Ltd.', 'Mist Avenue' and 'Mist Direct' is maintainable? Three Respondents- Appellants herein being separate corporate entities.

(ii) Whether Section 7 Application filed by the allottees fulfils the threshold as prescribed under the IBC?

(iii) Whether while scrutinizing the claims of each applicants of joint application filed under Section 7, it has to be established that the financial debt exist against each applicant in which default has been committed and the claim of the applicants is not barred by limitation and applicants fulfil all eligibility of valid allottee who is entitled to file Section 7 application?

Question No.(i)

10. For answering Question No.(i), we need to first notice the nature of transaction entered between the allottees and the three Appellants who are Respondents to Section 7 Application. Appellant- 'Anand Infoedge Pvt. Ltd.' was allotted land measuring 100,980 sq. mtrs. bearing Plot No.1, Sector 143 Noida by the New Okhla Industrial Development Authority by Lease Deed dated 21.08.2008. The Appellant- 'Anand Infoedge Pvt. Ltd.' after taking possession on 28.08.2008 entered into Collaboration Agreement with 'Mist Avenue' on 28.07.2014 which was made effective from 26.10.2012. The Collaboration Agreement was executed between 'Anand Infoedge Pvt. Ltd.' and 'Mist Avenue'. It is useful to extract the following part of the Collaboration Agreement:-

> *"AND WHEREAS the Owner has agreed to authorize the Developer to construct and develop the entire plot the land described in the schedule marked hereto as "Annexure A" by constructing the said buildings;*
>
> *AND WHEREAS THE Developer shall construct and develop the said buildings and shall be entitled to sell and recover 85% of the units constructed and also is solely entitled to sell the balance 15% of units belonging to the Owner, on their behalf.*
>
> *All sales transactions including advances collected by the Developer for any are sold in the entire project, whether out of the Developer's share or the Owner's share will be binding on the Owner both the parties shall be jointly and severally responsible to*

deliver as per contracts/deals entered by the Developer with such buyers/customers/Investors.

AND Whereas developer have accepted the proposal of the land owners and the both the parties to this agreement are now destrous of recording the stipulations, terms and conditions governing this agreement in writing as follows:

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. *The Developer hereby agrees to develop and/or cause to be developed the said buildings on the said land for and on behalf of the Owner on the terms mentioned herein and as permitted by the concerned authorities. The Developer agrees that it will obtain the necessary permissions required to develop the property, at its own costs and responsibility, but in the name of the Owner and on its behalf.*
2. *In consideration of the Owner having agreed to entrust to the Developer the development of the said land described in the schedule hereunder written, and to confer upon the Developer the rights, powers, privileges and benefits as mentioned herein, the Developer agrees that after completion of the said project, as per specifications agreed separately in writing, the share of the parties in the built up space (the said buildings) will be as follows:*

OWNER:	*15%*	*(Fifteen Percent)*
Developer:	*85%*	*(Eighty Five Percent)*

The Developer is however solely authorized for Sale of the entire project area including Owner's share of15% share of built up space in its exclusive discretion.
All contracts entered into by the Developer in this regard will be binding on the Owner.
This Collaboration agreement will not be treated as a partnership between the Owner and the Developer."

11. By the Collaboration Agreement, developer was authorised to develop the building and entitled to sell or recover 85% of the units constructed and was also entitled to sell the balance 15% of the units belonging to 'Anand Infoedge Pvt. Ltd.' on their behalf. 'Mist Avenue' in pursuance of the Development Agreement has allotted different units to the allottees who are Respondents herein. Copy of one Builder Buyers' Agreement has brought on record by the Appellant along with the additional documents filed on 03.02.2023. Builder Buyer Agreement entered between 'Mist Avenue' and one allottee Mr. Gaurav Bhardwaj who has allotted IT&ITES Shop(s) Number-43, Level- FCGF, Plot No.1, Sector 143 B, Noida, Uttar Pradesh. We also need to notice certain clauses of Builder Buyers' Agreement. The allotment was made for consideration as noticed in the agreement. With regard to possession, Clause 2 of the Builder Buyer Agreement provides as follows:-

"2. POSSESSION
2.1. The Company shall endeavour to complete the construction of the said IT Shop within a period of 36 months with the grace period of 12 months from

the date of execution of the Buyers Agreement subject to timely payment by the Intending Allottee(s) of sale price, stamp duty and other charges due and payable according to the Payment Plan applicable to him or as demanded by the Company, failing which company shall pay Rs. 9 per. per month delay charges for delayed period provided no force majeure prevails. The Company on obtaining certificate for occupation/completion and use from the competent authorities shall hand over the IT & IT Enabled Services Shop (s) to the Intending Allottee(s) for his/her occupation and use and subject to the intending Allottee(s) having complied with all the terms and conditions of the IT & IT Enabled Services Shop (s) Buyers Agreement. In the event of his/her failure to take over and/or occupy and use the IT & IT Enabled Services Shop (s) provisional and/or finally allotted within 30 days from the date of intimation in writing by the Company, then the same shall lie at his/her risk and cost and the Intending Allottee(s) shall be liable to pay to the Company compensation @ Rs. 25/- per sq. ft. per month of the super area per month for the entire period liable to pay to of such delay. The compensation shall be a distinct charge in addition to maintenance charges, and not related to any other charges as provided in this application and IT & IT Enabled Services Shop (s) Buyers Agreement. In any case, the Intending Allottee(s) shall take possession of the allotted IT & TT Enabled Services Shop (s) within 3 months from the aforesaid date of intimation failing IT & IT

Enabled Services Shop (s) which the allotment in favour of the Intending Allottee(s) shall be cancelled and the provision of Para 1.7 & 10 shall be applicable thereafter. The intending allottee(s) would only be refunded service tax subject to refund from the Govt. or any competent authority, any Incidental and processing charges in this regard shall be recovered from the allottee(s).”

12. The first Collaboration Agreement was cancelled by ‘Anand Infoedge Pvt. Ltd.’ vide cancellation deed dated 27.07.2017 entered between ‘Anand Infoedge Pvt. Ltd.’ and ‘Mist Avenue’. The Cancellation Agreement provided that second party has handed over the possession of the project land back to the first party on “AS IS WHERE IS WHAT EVER THERE IS” basis along with all material/ equipment etc. lying at the site. On the same day i.e. on 27.07.2017, Collaboration Agreement was entered between ‘Anand Infoedge Pvt. Ltd.’, ‘Mist Direct’ and ‘Mist Avenue’. ‘Mist Avenue’ which by Second Collaboration Agreement has granted development construction right and development of project to ‘Mist Direct’. Agreement also contemplates execution of General Power of Attorney i.e. ‘Mist Direct’ revenue share was provided in clause 3.1 which is to the following effect:-

“3. REVENUE SHARE

3.1. *In consideration of the grant/transfer/assignment of the Development Rights by Owner to the Developer, and the Developer undertaking the Project under the terms of the Development Agreement, it has been agreed between*

Owner and the Developer to share the Gross Sales Revenue in the manner provided below:

a. The entire revenue collected from the sale/ allotment /leasing of the other saleable areas of the Project, being Gross Sales Revenue, shall be deposited directly in Escrow Account only and any revenue generated from any booking in the Project and received in any account other than said Account shall be treated as void booking and shall not be acceptable. The balance in Account after all adjustments, payment to the authorities, taxes any cess etc. shall be apportioned in the following manner:

(i) Owner's Share : 15%

(ii) Developer Share : 85%"

13. We have noticed above that after Second Collaboration Agreement also, the project could not be completed and UPRERA vide its order dated 07.12.2019 has cancelled the project registration and it was thereafter the allottees filed Section 7 application. The objection which was raised by the Appellants to Section 7 application was that the single application against the three companies are not maintainable. The Respondents were all three different Corporate Debtors and single application was not maintainable against them.

14. When we look into the sequence of the facts and material on record, it is clear that the project is one namely— 'Festival City' in which project under first Collaboration Agreement w.e.f. 26.10.2012, 'Mist Avenue'

undertook to develop the project and allotted the units to the allottees including the Applicants who are Respondents herein. After cancellation of first Collaboration Agreement and entering into second Collaboration Agreement, on same date, the second Collaboration Agreement, 'Mist Direct' issued letter to allottees informing allottees that now 'Mist Direct' has taken charge of the inventories already sold and has received all documents together with the account of money paid by allottees. It is useful to extract the letter dated 02.12.2017 issued by 'Mist Direct' to all allottees, which is to the following effect:-

"MIST DIRECT SALES PRIVATE LIMITED
Registered office: Grg. No. 1 Gole market, Bhagat Singh Marg. New Delhi -110001
CIN: U70101DL2013PTC253541
PAN-AAICM6219N
Email-customercare@mistavenue.co.in

Date-02-Dec-17

To

Mr. Gaurav Bhardwaj
FLAT No. 615, Supertech Avant
GARDE, Plot No. 1, Sec-5, Vaishali Ghaziabad

Subject: important Communication

Dear Customer,

At the outset we wish to thank you all for your support and patronage with which the Festival City' (Project) is coming up inspite of various challenges/delays caused in obtaining various permissions and approvals (since obtained by the Company).

We were monitoring the progress of the Project closely with an intention to expedite the same to ensure delivering of your Unit(s) as early as possible inspite of

the many speed breakers/disturbances. We found that there was need for strengthening the process. If necessary reorganizing the Project implementation plan.

We are happy to inform you that erstwhile Management for various reasons ultimately we decided to bring us as new and efficient implementing partner so that our esteemed buyers may be delivered their Units as early as possible.

Accordingly, the arrangements of Anand Infoedge Private Ltd. ('AIPL') with earlier collaborator (Mist Avenue Private Ltd) were cancelled in entirety and a new arrangement was entered with us on 27th July 2017. We have now taken charge of the project for early implementation. Our esteemed allottees/buyers shall be provided the Services in best possible manner.

We wish to inform you that we have also taken charge of the inventories already sold by the earlier company and have received all your papers/documents together with the account of money paid by you under the assignment arrangements made for the said purpose.

We solicit your cooperation and patronage and to bless us to achieve the target much before the schedule date.

With warm personal regards.

Yours Truly

For Mist Direct Sales Private Ltd.

(CRM TEAM)"

15. When we take a holistic view of the matter, it is clear that all three Appellants had joined hands to develop the project. Present is a case of Real Estate Project and the project cannot be successfully developed by any one of the Appellants who were Respondents in Section 7 application. Under the Collaboration Agreement, 'Anand Infoedge Pvt. Ltd.' and developers have

undertaken several responsibilities towards the allottees. The construction of Real Estate Project will not be achieved in event joint insolvency is not initiated against all the three Corporate Debtors who are Appellants before us, the allottees will put to severe loss and hardship. CIRP in the Real Estate Project has different contours and ramification. It is also on the record that at a time when 2nd Collaboration Agreement was entered between 'Anand Infoedge Pvt. Ltd.'and 'Mist Direct', 'Anand Infoedge Pvt. Ltd.' has 99.99% shareholding in 'Mist Direct'. All three companies who are impleaded as Respondents in Section 7 Application and Appellants before us are closely connected with the construction and implementation of the project. The developer who have issued allotment letter and executed Builder Buyer Agreement was acting on behalf of 'Anand Infoedge Pvt. Ltd.' who has given authority to 'Mist Direct'.

16. From the above facts and sequence of events, it is clear that all the three Appellants i.e. Anand Infoedge Pvt. Ltd., Mist Direct Sales Pvt. Ltd. and Mist Avenue Pvt. Ltd. are intrinsically interwoven with the project in question i.e. Festival City in which the Respondents allottees were allotted units. Collaborator No. 1 and 2 are part of project who were entrusted with the development and sale of units. It was collaborator No. 1 who received the payment from the allottees towards allotment of units in favour of the Respondents. All the three Appellants being involved with the one single project in which the allottees have been allotted units, all are necessary ingredients of any resolution which may help the allottees to receive their units, in absence of any of the appellants in Corporate Insolvency Resolution

Process, Resolution of project and revival of the Resolution of project is impossible.

17. We need to look into some decided cases which have been cited by both the parties in support of their submissions. We may first notice Judgment in **C.A.(AT) Ins. No. 155 of 2018, Mamatha Vs. AMB Infrabuild Pvt. Ltd. & Ors.** The above case was a case where an application was filed under Section 7 by a Real Estate Allottee, against two corporate debtors were impleaded in the Application, Application was rejected by the Adjudicating Authority. In the Application AMB Infrabuild Pvt. Ltd. who was owner of the land and Earth Galleria Pvt. Ltd. who was developer, both were impleaded as Corporate Debtor No. 1 and 2. Collaboration Agreement was entered between both the Respondents i.e. owner of the land and developer to develop the project. This Tribunal noticed the facts of the case and made following observations and conclusions in paragraph 11,12,13 and 14:

> *"11. The 'Collaboration Agreement' dated 3rd May, 2013 reached between the 'Owner of the Land'- 'AMB Infrabuild Pvt. Ltd.' and the 'Developer'- 'Earth Galleria Pvt. Ltd.' shows that the 'Developer' will sell the flats to the extent of its own shares and the 'Land Owner' will sell the developed portion of its own shares. The 'Land Owner' have agreed to make it as a 'Joint Venture Project' and treated the 'Joint Venture Project' for all purpose as evident from Clause 55 of the 'Collaboration Agreement' dated 3rd May, 2013 read with Memorandum of Understanding reached between three allottees, the Appellant and the 1st and 2nd Respondents dated 6th February, 2016.*

12. The 'Developer'- 'M/s. Earth Galleria Pvt. Ltd.' having been empowered by 'M/s. AMB Infrabuild Pvt. Ltd.'- ('Land Owner') to advertise the project and for marketing the developed property as a 'Joint Venture Project', in terms with the said 'Collaboration Agreement' on behalf of the joint venture, if the Memorandum of Understanding dated 20th June, 2014 has been reached between the 'Earth Infrastructure Ltd.' and the Appellant- Mrs. Mamtha, the 2nd Respondent cannot take a plea that it is not a signatory to the Memorandum of Understanding dated 20th June, 2014, the 2nd Respondent being represented by 'Earth Infrastructure Ltd.' pursuant to the 'Collaboration Agreement'.

13. The Adjudicating Authority has failed to take into consideration the aforesaid facts and wrongly held that the 'Corporate Insolvency Resolution Process' cannot be initiated against the two 'Corporate Debtors'.

14. If the two 'Corporate Debtors' collaborate and form an independent corporate unit entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one or other."

18. Appeal was allowed and Order of the Adjudicating Authority was set aside and this Tribunal directed the Ld. Adjudicating Authority to admit the Application. A Civil Appeal No. 12069 of 2018 was filed against the above Judgment of this Tribunal which was dismissed by the Hon'ble Supreme Court vide its Order dated 04th January, 2019 which reads as follows:

"1) Heard the learned Senior Counsel for the appellant.

2) We see no reason to interfere with the order passed by the National Company Law Appellate Tribunal, New Delhi.

3) Accordingly, the Civil Appeal is dismissed.

4) Pending applications stand disposed of."

19. Next Judgment relied by Learned Counsel for the Respondents is Judgment of this Tribunal in **C.A.(AT) Ins. No. 377 of 2019, Edelweiss Asset Reconstruction Company Ltd. Vs. Sachet Infrastructure Pv.t Ltd.** The above was also a case of an Infrastructure Company. The principal borrower was Adel Landmarks Ltd. Corporate Guarantee was given by different corporate guarantees for securing the loan, separate applications were filed under Section 7 of the Code. Application against the principal borrower under Section 7 was admitted by the Adjudicating Authority and when the question arose regarding applications under Section filed against the principal guarantors this Tribunal in paragraph 9 noted the case of the Appellant:

> *"9. According to the Appellant, the nine 'Corporate Debtors', as referred to above, are the landholders who in concert with 'Adel Landmarks Limited' ('Principal Borrower') decided to develop the total area by constructing Infrastructure for the allottees. The Agreements were signed between 'Adel Landmarks Limited' and nine 'Corporate Debtors' aforesaid for such development and for the said reason, 'Principal Borrower' had availed term loan of Rs. 170 Crores from 'ECL Finance Limited' (original 'Financial Creditor') in whose favour nine 'Corporate Debtors' had executed guarantee to repay the debt. Copies of the 'Loan Agreement' and the 'Corporate Guarantee Agreement(s)' dated 7th October, 2013 and the 'Assignment Agreement' of 'ECL Finance Limited' dated 23rd March, 2017 whereby debt has been assigned in*

favour of the Appellant- 'Edelweiss Asset Reconstruction Company Limited' have been enclosed."

20. This Tribunal noticing the facts and Judgment of this Tribunal in Mrs. Mamatha Vs. AMB Infrabuild Pvt. Ltd., following was laid down by this Tribunal in paragraph 32, 33 and 34:

"32. As the project will be developed on the land of five 'Corporate Debtors', as referred to above as per the township plan, they have rightly taken plea that simultaneous 'Corporate Insolvency Resolution Processes' should continue against them under the guidance of same 'Resolution Professional'.

33. We find that it is a case of joint consortium of different 'Corporate Debtors' and thereby a group insolvency is required to develop the township on the land of 'Sachet Infrastructure Pvt. Ltd.'; 'Magad Realtors Pvt. Ltd.'; 'Mehak Realtech Pvt. Ltd.'; 'Sameeksha Estate Pvt. Ltd.' and 'Jamvant Estates Pvt. Ltd.' and others along with 'Corporate Insolvency Resolution Process' as initiated against 'Adel Landmarks Limited' who is the sole Developer.

34. For the said reasons, we hold that group 'Corporate Insolvency Resolution Process' proceeding is required to be initiated against five 'Corporate Debtors' namely— 'Sachet Infrastructure Pvt. Ltd.'; 'Magad Realtors Pvt. Ltd.'; 'Mehak Realtech Pvt. Ltd.'; 'Sameeksha Estate Pvt. Ltd.' and 'Jamvant Estates Pvt. Ltd.' apart from the 'Corporate Insolvency Resolution Process' which has already been initiated against 'Adel Landmarks Limited'- ('Principal Borrower')."

21. This Tribunal ultimately allowed the Appeal and directed the Adjudicating Authority to admit Section 7 Application and to initiate a

consolidated Resolution Plan for total development. In paragraph 42, following was held:

> *"42. The Adjudicating Authority will admit the applications under Section 7 filed by 'Edelweiss Asset Reconstruction Company Limited' against 'Sachet Infrastructure Pvt. Ltd.'; 'Magad Realtors Pvt. Ltd.'; 'Mehak Realtech Pvt. Ltd.'; 'Sameeksha Estate Pvt. Ltd.' and 'Jamvant Estates Pvt. Ltd.' and appoint the 'Resolution Professional' of 'Adel Landmarks Limited'- (Developer) ('Principal Borrower') as common 'Resolution Professional' to ensure that the 'Corporate Insolvency Resolution Process' against 'Adel Landmarks Limited'- ('Corporate Debtor') proceed jointly and 'Information Memorandum' is prepared in a manner that the 'Residential Plotted Colony' at village Palwal at Sectors 8 & 9 in terms of the License No. 46 of 2009 and License No. 53 of 2009, is completed in one go by initiating a consolidated 'Resolution Plan(s)' for total development."*

22. The above two judgments clearly support the submission of the Respondents that consolidated Insolvency Resolution Process can be initiated against one or more Corporate Debtors who have come together to develop a project.

23. Mr. Abhijeet Sinha, Learned Counsel appearing for the Appellant-Anand Infoedge Pvt. Ltd. has relied on the Judgment of this Tribunal in **Radico Khaitan Ltd. Vs. BT&FC Pvt. Ltd. & Ors., C.A.(AT) Ins. No. 919 of 2020**. Mr. Sinha submits that this Tribunal relying on the order of the Adjudicating Authority in State Bank of India Vs. Videocon Industries Ltd. laid down that for consolidating the CIRP of more than one Corporate Debtor certain criteria have to be filled up. This Tribunal in Radico Khaitan has

noted the parameters of common control, common directors, common assets, Common liabilities, inter-dependence, pooling of resources, intricate links between companies and common financial creditors, this Tribunal after adverting to the aforesaid parameters held that above eight parameters are fully met in the aforesaid case hence the common resolution professional is to carry out and perform the function of Resolution Professional. One fundamental distinction between the Judgment relied by Learned Counsel for the Appellant in Radico Khaitan as well as Judgment of SBI vs. Videocon Industries Ltd. is that the aforesaid cases were not of real estate project. We in the present case are dealing with the real estate projects. We thus are of the view that parameters as were noticed in SBI vs. Videocon Industries Ltd. and Radico Khaitan need not be applied in case of Real Estate Project.

24. From the Judgments delivered by this Tribunal as noted above, it is clear that with regard to Real Estate Projects, this Tribunal has accepted the filing of Application against two or more corporate debtors who were part of the project and the said applications were held maintainable. In the present case, the Adjudicating Authority after noticing the terms and conditions in the collaboration agreement had made following observations in paragraph 14-15 of the Judgment:

> *"14. Therefore, it is clear that the subsequent to the cancellation of the first collaboration agreement between the Respondent No. 1 and Respondent No. 2 Company, Respondent No. 3 Company had stepped into the shoes of the Respondent No. 2 Company. The Respondent No. 3 Company vide its communication dated 02.12.2017 to the financial creditors, had acknowledged its arrangement*

with the Respondent No. 1 Company and also informed that it has taken over the charge of the inventories already sold by the Respondent No. 2 Company and have received all the papers together with the account of money paid by the financial creditors. However, it is pertinent to mention here that allotment letter was issued in the letterhead of Respondent No. 2 and payments were made in the account of Respondent No. 2.

15. Further, we are of the considered view that Respondent No. 1 Company and Respondent No. 3 Company are being controlled and managed by the same group of promoters. Mere change in the shareholding of the Respondent No. 3 Company will not save the Respondent No. 1 Company since the conspectus of facts it is evident that Respondent No. 3 Company was created by the Respondent No. 1 Company only as a face for the project Festival City, whereas the ultimate beneficiary is the Respondent No. 1 Company only as in the Second Collaboration Agreement, the Respondent No. 3 Company was authorized to take all appropriate actions as well as it was made obliged to incur costs in relation to the project and also responsible for developing strategy of marketing and such other decisions regarding the marketing, branding, pricing, sales and all other decisions stated to be decided with mutual consent. However, Respondent No. 3 company has not been given any power to sell units under the project to any third party without the consent of Respondent No. 1 Company, which clearly established the relation of the principal and agent between the parties."

25. We are in agreement with the view expressed by the Adjudicating Authority that Section 7 Application filed against all the three appellants together is maintainable. The three appellants being part of one Common

Real Estate Project and the Applicants of Section 7 Application being part of the said project they had every right to initiate Section 7 Application against all the three appellants together. We thus uphold the decision of the Adjudicating Authority holding that application under Section 7 is maintainable.

Question No. (ii) and (iii):

26. Both the questions being inter-related are taken together. Section 7 of IBC were amended by Act 1 of 2020 on 28.12.2019. By the amendment, Section 7(1) as amended by Act of 01 of 2020 is as follows:

> *"Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:*
>
> *Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:*
>
> *Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act,*

> *2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.*
>
> *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."*

27. We in the present case are concerned with the Second Proviso which provides that an Application for initiating Corporate Insolvency Resolution Process against the corporate debtor shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10 % of the total number of such allottees under the same real estate whichever is less. The present is a case where all the allottees that is applicants under Section 7 were allottees of same real estate project that is Festival City which project was being developed on Plot No. 1, Sector 139, NOIDA of land allotted to Anand Infoedge Pvt. Ltd. by lease deed dated 21st August, 2008 on land admeasuring 1,00,980 sq. m.

28. The challenge which has been mounted by Mr. Krishnendu Datta, Learned Sr. Counsel appearing for Mist Avenue Pvt. Ltd. is the threshold as required under sub-section 1 of Section 7, 2nd Proviso i.e. Application be filed by minimum 100 allottees is not fulfilled in the present case. Mr. Dutta appearing for Mist Direct Sales Pvt. Ltd. i.e. Second Collaborator during his submission has contended that there were only 115 units allotted to the Applicants although applicants were 143. It is submitted that there were several claims of allottees which could not have been treated to be valid

claims. Claims of those allottees which are not valid due to any legal bar or any other valid reason could not be treated to be valid allottees and have to be deleted from the number of 115 and those allottees whose claims are barred or premature or have been settled, be excluded. The number of allottees does not complete the figure 100 hence the Application did not fulfil the threshold and was liable to be rejected on this ground alone. Mr. Dutta during his submission has submitted that claims of following number of allottees have to be excluded i.e. (a) claims of 18 allottees which are barred by limitation, (b) claims of five allottees which are premature, (c) claim of eight allottees which are settled and (d) claim of eleven allottees whose claims are hit by Section 10A of IBC. Before the Adjudicating Authority, the above submissions were pressed on behalf of Learned Counsel for the Appellants who are respondents in the Application. The above submission was answered by the Adjudicating Authority in Paragraph 11 of the Judgment which is to the following effect:

> *"11. The Corporate Debtor No. 3 had objected that the claim of 11 creditors are barred by Section 10A of the Code. At this juncture, this Adjudicating Authority is not inclined to determine the date of default of the alleged 11 creditors, as we are satisfied that the threshold limit of 100 real estate allottees i.e., 103 allottees (55 allottee as claimed by corporate debtor No. 3 + 37 allottees claim alleged to be barred by limitation + 06 allottees who have settled claim after filing of the present petition + 05 allottees alleged to have premature claim) satisfied the criteria as provided in second proviso to the Section 7(1) of the Code, 2016."*

29. What has been observed by the Adjudicating Authority, it is clear that M/s. Mist Direct Sales Pvt. Ltd. has contended that there are only 55 valid allottees. The Adjudicating Authority held that claim of 37 allottees whose claim were barred by limitation, six allottees whose claims were settled and five allottees whose claims were premature, satisfied the criteria provided in Second Proviso of Section 7(1). The Adjudicating Authority thus returned a finding that there are 103 valid allottees hence the application fulfilled the threshold.

30. We now proceed to examine the submission of Learned Sr. Counsel, Mr. Krishnendu Datta submitting that threshold was not fulfilled.

31. Learned Counsel for the allottees refuting the submissions submitted that the requirement of Section 7, 2nd Proviso as now explained by the Hon'ble Supreme Court as has been held in **2021 5 SCC 1, Manish Kumar Vs. Union of India and Anr.** is that Applicants who prove that there is default of debt of Rs. 1 Crores, it is not necessary that all the applicants should have default of Rs. 1 Crore each or all the applicants should have come up within the period of limitation and fulfilled all necessary ingredients for filing an application under Section 7 of the Code. Submission of Learned Counsel for the allottees is that if default of Rs. 1 Crore towards any of the allottees is fulfilled, all applicants need not prove that default exists by them. It is further held by Hon'ble Supreme Court that if default qua few allottees is of Rs. 1 Crore and within limitation, it is not necessary that all applicants who were joint in the application should have claims within limitation.

32. We first proceed to consider the submission of Mr. Dutta regarding question of limitation. Submission of Mr. Dutta is that all applicants who were joint in the application who have jointly filed Section 7 Application, their claims should be within limitation and claims of those applicants who are beyond limitation have to be excluded and those allottees should not be counted within the number of 100 allottees which threshold is required to be fulfilled. Mr. Dutta, Learned Sr. Counsel has relied on Judgment of this Tribunal in **Abhijeet Jasrasaria Vs. JOP International Ltd., 2022 SCC OnLine Nclat 2070.** In the above case, Section 7 Application filed by a Financial Creditor was rejected on the ground that Application was barred by time. Mr. Dutta submits that this Tribunal has held the fact that the default is continuing as no possession has been given to the allottees till date, was not accepted by the Tribunal for computing the limitation. Mr. Dutta has relied on paragraph 9 of the Judgment which is to the following effect:

> *"9. To meet the limitation provided under Article 137, submission of the Counsel for the Appellant is that he has a continuing cause of action since as per Agreement dated 24.02.2009, the Appellant had not been given possession of the shops. The fact that Appellant was not given possession of the shops by the Corporate Debtor may be ground and reason for filing complaint under Real Estate Regulatory Authority Act before UP RERA which complaint has already been filed by the Appellant and was allowed on 06.03.2019 but for filing Application under Section 7, Application has to be within three years from the date when right to apply accrues. When default of a financial*

debt was committed on 24.10.2010 as claimed by the Appellant, the right to apply accrue to him and no other date of default having been given in Part-IV, the limitation shall not stop running merely because Appellant claims that he has not been given possession of the shops. The Application was thus clearly barred by time and could not have been entertained by the Adjudicating Authority. The Application having been filed beyond three years from the date when right to apply accrues, the same deserves to be rejected."

33. We now need to notice the clause regarding position of the units of the allottees. Clause 2 of the Builder Buyers Agreement provides for the position which is to the following effect:

"2. Possession

2.1 The company shall endeavour to complete the construction of the said IT shop within a period of 36 months with the grace period of 12 months from the date of execution of the Buyers Agreement subject to timely payment by the intending Allottee(s) of sale price, stamp duty and other charges due and payable according to the payment plan applicable to him or as demanded by the Company, failing which company shall pay Rs. 9 per sq. ft. per mohth delay charges for delayed period provided no force majeure prevails. The Company on obtaining certificate for occupation/completion and use from the competent authorities shall hand over the IT & IT enabled services shop (s) to the intending allottee(s) for his/her occupation and use and subject to the Intending Allottee(s) having complied with all the terms and conditions of the IT & IT enabled Services Shop (s) Buyers Agreement. In the event of his/her failure to take over and/or occupy and

use the IT & IT Enabled Serices Shop(s) provision and/or finally allotted within 30 days from the date of intimation in writing by the Company, then the same shall lie at his/her risk and cost and the intending allottee(s) shall be liable to pay to the Company compensation @ Rs. 25/- per sq. ft. per month of the super area per month for the entire period of such delay. The compensation shall be a distinct charge in addition to maintenance charges, and not related to any other charges as provided in this application and IT & IT Enabled Services Shop(s) Buyers Agreement. In any case, the Intending Allottee(s) shall take possession of the allotted IT & IT Enabled Services Shop(s) within 3 months from the aforesaid date of intimation failing IT & IT Enabled Services Shop(s) which the allotment in favour of the Intending Allottee(s) shall be cancelled and the provision of Para 1.7 & 10 shall be applicable thereafter. The intending allottee(s) would only be refunded service tax subject to refund from the Govt. or any competent authority, any incidental and processing charges in this regard shall be recovered from the allottee(s).”

34. The clause indicate that Company had to endeavour to complete the construction of the said IT Shop within a period of thirty six months with the grace period of 12 months from the date of the Builders Buyers Agreement. It further contemplated that in event the Company is unable to complete construction within time company was to pay Rs. 9 Sq. Ft. delay charges for the delayed period thus the cause of action continues with the allottees to even after expiry of 36 months and 12 months since the entitlement of the allottees to receive Rs. 9 per sq. ft. per annum delay charges was very much contemplated in the clause thus it cannot be said

that if the allottees did not sue within a period of four years from date of agreement their right to sue came to an end. Right to sue continues since the allottees were fully entitled to sue the developer by claiming Rs. 9 Sq. Ft. per month delay charges. Thus when we look into the clause 2.1 of the Builder Buyers Agreement as noted above it is clear that the right to sue continues with the allottees even after expiry of period of 4 years from the date of builders buyers agreement admittedly project has not been completed by the Appellants and construction of units has not been completed nor any construction certificate has been obtained. In the facts of the present case, we are of the considered opinion that submissions of the Appellant that Applications of 18 allottees who is barred by time hence they should be excluded from number of 100 applicants has to be rejected.

35. Learned Counsel for the allottees have relied on Judgment of Hon'ble Supreme Court in **2022 4 SCC 103, Samruddhi Cooperation Housing Society Ltd. Vs Mumbai Mahalaxmi Construction Pvt. Ltd.** In the above case, the Hon'ble Supreme Court had occasion to examine the question of limitation with regard to complaint under Consumer Protection Act, 1986. Hon'ble Supreme Court had referred to Section 22 of the Limitation Act in the above case, Section 22 of the Limitation Act provides as follows:

> *"22. Continuing breaches and torts.—In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."*

36. In paragraph 13 and 18 of the Judgment, following was laid down:

13. Section 22 of the Limitation Act 1963 5 provides for the computation of limitation in the case of a continuing breach of contract or tort. It provides that in case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. This Court in Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan elaborated on when a continuous cause of action arises.

....

18. A continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. Section 3 of the MOFA imposes certain general obligations on a promoter. These obligations inter alia include making disclosures on the nature of title to the land, encumbrances on the land, fixtures, fittings and amenities to be provided, and to not grant possession of a flat until a completion certificate is given by the local authority. The responsibility to obtain the occupancy certificate from the local authority has also been imposed under the agreement to sell between the members of the appellant and the respondent on the latter."

37. The above judgment also supports the submission of allottees that Appellants are in continuing the breach of the contract which was entered with the allottees and it cannot be said that applications filed by 18 allottees were barred by Limitation and they should not be included in the computation of number of 100 allottees.

38. Now we proceed to look into the Judgment of the Hon'ble Supreme Court in Manish Kumar (Supra) on which reliance has been placed by Learned Counsel for the allottees. In the above judgment of Hon'ble

Supreme Court, the amendments made in Section 7 (1) by Act of 1 of 2020 came to be challenged in a writ petition under Article 32. Writ Petition was filed by the allottees of Real Estate Project challenging the amendment on various grounds and various submissions were made by the allottees to impugn the amendment. The Hon'ble Supreme Court had considered the various submissions advanced by the allottees under the heading 'the problem of default and limitation". From paragraph 159-175, the submission of the allottees were noted. Paragraph 159 is to the following effect:

> *"THE PROBLEM OF DEFAULT AND LIMITATION*
> *125. It is urged on behalf of the petitioners that the provisos requiring support of one hundred persons or one-tenth of the allottees, whichever is lower, is unworkable and arbitrary having regard to the provisions of the Code. There can only be one default in a complaint, it is contended. When the required number of allottees may have to be drawn from allottees who may have entered into agreements with the builder on different dates, the date of default would be different. This would adversely impinge on the absolute right which otherwise exist with an allottee to make an application under Section 7 of the Code."*

39. Hon'ble Supreme Court after noticing the explanation to Section 7(1) and the definition of default under Section 3(12) held that the financial debt which is owed to any other financial creditors of the Corporate Debtor would suffice to make an application on the basis of that default. In paragraph 164, following has been laid down:

"164. The Explanation makes it clear that a financial debt, which is owed to any other financial creditor of the corporate debtor would suffice to make an application on the basis that the default has occurred. Default has been defined in Section 3(12) of the Code as follows:

"3(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 repaid by the debtor or the corporate debtor, as the case may be;"

40. Hon'ble Supreme Court has also referred to earlier judgment of Hon'ble Supreme Court in Innoventive Industries Ltd. Vs. ICICI Bank Ltd., 2018 1 SCC 407, Hon'ble Supreme Court in Innoventive Industries (supra) had while considering Explanation to Section 7(1) held that the default in respect of a financial debt owed to **any** financial creditor of the Corporate Debtor it need not be a debt owed to the Applicant Financial Creditor. In paragraph 165 of the Judgment of Manish Kumar, following has been observed:

"165. Interpreting these provisions and the Rules as well, this Court in Innoventive (supra), held as follows:

"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 any 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 may 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."

41. In Manish Kumar, the Hon'ble Supreme Court had also occasion to consider the question of delay in filing the Application under Section 7 with regard to the Applicants. Hon'ble Supreme Court in Manish Kumar case

held that litmus test on the anvil of which, the adjudicating authority will scrutinise the matter is only the existence of the default as defined under Section 4 of the Code. If the Financial Debt of Rs. 1 Crores has not been paid the doors are thrown open for the processes under the code, following was held in paragraph 168:

> *"168. It is, therefore, clear that the requirement of the Code in regard to an application by a financial creditor does not mandate that the financial debt is owed to the applicant in terms of the Explanation. This is for the reason that apparently that the CIRP and which, if unsuccessful, is followed by the liquidation procedure is in all a proceeding, in rem. The Law Giver has envisaged in the Code, an action, merely for setting in motion the process initially. The litmus test on the anvil of which, the Adjudicating Authority will scrutinize the matter, is only the existence of the default, as defined in Section 4 of the Code. As on date, the amount of default is pegged at Rs.1 crore. Present a financial debt which has not been paid, the doors are thrown open for the processes under the Code to flow in and overwhelm the corporate debtor. The further barrier is limitation, no doubt, as noticed in B.K. Educational Services Private Limited v. Parag Gupta & Associates"*

42. However, explaining the amendment brought in Section 7, following were observed in paragraph 171 of the Judgment:

> *"136. In practice, it may be unlikely, however, that persons would come together as applicants under the Code, if they are real estate allottees, particularly knowing what the admission of application under Section 7 entails, and the destiny of an application which has reached the stage of*

compulsory winding up under Section 33. However, taking a more likely example, viz., of the corporate debtor operating in the real estate sector and an allottee moving an application upon there being amounts due to him, prior to the amendment, undoubtedly, a single allottee could set the ball in motion and all he had to satisfy is default to him or any other financial creditor. The change that is brought about is only that apart from establishing the factum of default, he must present the application endorsed by the requisite number introduced by the proviso. Since, default can be qua any of the applicants, and even a person, who is not an applicant, and the action is, one which is understood to be in rem, in that, the procedures, under the Code, would bind the entire set of stakeholders, including the whole of the allottees, we can see no merit in the contention of the petitioner based on the theory of default, rendering the provisions unworkable and arbitrary."

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

"175. Another aspect, which is raised, is that in the example of a hundred allottees, if they have agreements, under which, the date of default is different, how is the application to be drafted and processed? What, if the debt is barred qua some of the applicants, whereas, it is not so in regard to the other applicants. Taking a cue from the Explanation to Section 7(1), all that would be required is, to plead the default, no doubt, in the sum of Rs. 1 crore, which is not barred as the cause of action. In other words, if a law contemplates that the default in a sum of Rs.1

crore can be towards any financial creditor, even if he is not an applicant, the fact that the debt is barred as against some of the financial creditors, who are applicants, whereas, the application by some others, or even one who have moved jointly, fulfill the requirement of default, both in terms of the sum and it not being barred, the application would still lie."

44. From the ratio of the Judgment of Hon'ble Supreme Court in Manish Kumar, following conclusions are irresistible (i) In event the default of Rs. 1 Crore is made out against the Corporate Debtor it is not necessary that the default of Rs. 1 Crore should be qua of the applicants individually or separately if default of Rs. 1 Crore is made out qua any of the applicants or any other financial creditor who is not even part of the Application, application under Section 7 is maintainable. (ii) what is required to be proved under Section 7 is that the default of Rs. 1 Crore which is due on the Corporate Debtor is not barred by limitation if default of Rs. 1 Crore due of corporate debtor is within limitation the fact that claim of certain other allottees who were joint in the application is barred by limitation is insignificant. That in view of the clear pronouncement of Supreme Court as quoted above in para 175 of Manish Kumar (supra), the submission of Mr. Krishnendu Datta that claim of 18 allottees who are barred by time should be excluded from number of 100 which is required to be proved the threshold cannot be accepted. On the same ground submission of Mr. Krishnendu Datta that claims were premature has to be excluded cannot be accepted.

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

46. We thus are of the view that the Adjudicating Authority did not commit any error in returning the finding that threshold as required by Section 7(1), second proviso is fulfilled. In the present case, the Application under Section 7 is maintainable and objection that application is not

maintainable on the ground that it does not fulfil the threshold as provided under Section 7(1) Second Proviso has righty been rejected.

47. In view of the fore-going discussions, we are satisfied that no error has been committed by the Adjudicating Authority in holding that application under Section 7 filed by the Respondents allottees is maintainable. We thus do not find any grounds raised in these Appeals to interfere with the Impugned Order dated 21st October, 2022 passed by the Adjudicating Authority, in result, all the Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali/Basant B.