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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 08th November, 2023**
Pronounced on: 20th November, 2023

\+ **ARB. A. (COMM.) 7/2022 and IA 19939/2023**

ASSET RECONSTRUCTION COMPANY INDIA LTD.

..... Petitioner

Through: Mr.Jayant Mehta, Sr Advocate with Mr.Manmeet Singh, Mr.Yashvardhan Bandi, Ms.Anjali Dwivedi, and Mr.Samarth Sansar, Advocates.

versus

ATS INFRASTRUCTURE LIMITED & ORS. ..... Respondent

Through: Mr.Darpan Wadhwa, Senior Advocate with Mr.Ajay Bhargava, Mr.Aseem Chaturvedi, Ms.Warmika Trehan, Ms.Radhika Khanna, Advocates.
Mr.Kartik Nayar and Mr.Krish Kalra, Advocates.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA
YOGESH KHANNA, J.

1. The instant appeal has been preferred by the appellant seeking setting aside of an interim order dated 12.10.2021 passed by the learned sole arbitrator, Mr.Justice Swatanter Kumar (Retd.), under Section *17* of the Arbitration and Conciliation Act, 1996 ('Act') in an arbitration proceedings *inter-se* the respondents where the appellant was not a party, nor had any notice of such proceedings. It is alleged the impugned order directly interferes with the contractual rights and entitlements of the Appellants.

2. The following observation of the learned arbitrator in the impugned order dated 12.10.2021 are challenged:-

> ***VI. OPERATIVE PART OF THE ORDER***
> *In view of the undisputed factual matrix of the case, for reasons and discussions afore-recorded, the Arbitral Tribunal hereby passes the following orders and directions:*
> *1. The Claimants are hereby directed to furnish security by way of bank guarantees from a nationalized bank, to the extent and in favour of, as follows:*

CASE NO.	PARTICULARS	PERCENTAGE OF INVESTMENT	AMOUNT OF BANK GUARANTEE	IN FAVOUR OF
1.	Almond Infrabuild Pvt. Ltd. v. Dalmia Family Office Trust	12.4%	18.6 Crores	Dalmia Family Office Trust
2.	Domus Green Pvt. Ltd. & Ors. V. Dalmia Family Office Trust	8.39%	12.48 Crores	Dalmia Family Office Trust
3.	ATS Infrastructure Limited v. Dalmia Family Holdings LLP	10.61%	15.19 Crores	Dalmia Family Holdings LLP
10.&11.	Getamber Anand v. Rasbehari Traders & ATS Infrastructure Limited v. Rasbehari Traders	6.03%	9.05 Crores	Rasbehari Traders

> *2. The Claimants are further directed to furnish the list of flats/units to the extent and in favour of, as directed hereinafter.*
> *The list of the flats/ units so furnished along with allotment letters, shall be of the flats/units which are unencumbered, free of charge In all respects and the. third parties have no interest, whatsoever, in those flats/units. The details thereof are as follows:*

CASE NO.	PARTICULARS	NUMBER OF UNITS/FLATS	IN FAVOUR OF
1.	Almond Infrabuild Pvt. Ltd. v. Dalmia Family Office Trust	5.9 Flats Rounded off to 6 flats/units	Dalmia Family Office Trust
2.	Domus Green Pvt. Ltd. & Ors. V. Dalmia Family Office Trust	4.02 Flats Rounded off to 4 flats/units	Dalmia Family Office Trust
3.	ATS Infrastructure Limited v. Dalmia Family Holdings LLP	5.01 Flats Rounded off to 5 flats/units	Dalmia Family Holding LLP
10. & 11.	Getamber Anand v. Rasbehari Traders & ATS Infrastructure Limited v. Rasbehari Traders	2.89 Flats Rounded off to 3 units/flats	Rabehari Traders

> *3. These flats/units will remain as security in favour of the Respondents and will not be alienated, transferred or possession parted with in any manner, whatsoever, till*

disposal of the present proceedings.
4. The Claimants should comply with the above directions within a period of three weeks from today.
5. The Claimants are hereby restrained from alienating, transferred or parting with the possession of any flat/unit, in favour of any third party/financial institution, out of the seven stated projects, i.e. ATS Picturesque Reprieves, ATS Rhapsody, ATS One Hamlet, ATS Dolce, ATS Triumph, ATS Tourmaline and Pristine Golf Villas, without specific orders of the Tribunal for which the Claimants are at liberty to tile appropriate application with complete details.
5.1 This direction would remain in force till a period of three weeks or earlier, till the time the Claimants comply with the above direction in its entirety.
6. However, in the event of default, the injunction granted under this clause shall remain operative and effective in all respects. The Claimants are hereby injuncted and restrained from transferring, conveying or selling in any manner, whatsoever, and/or parting with the possession of any of their flats/units in favour of any party, till compliance of the directions contained in this order in regard to the above seven projects.

3. It is alleged the impugned order directs the creation of security on certain apartments on 'ATS Triumph' and 'ATS Tourmaline" being constructed by respondents No. 2 and 3 i.e., the borrowers of the appellant, on which the borrowers had already created security in favour of the appellant. Further, it is alleged the impugned order interferes with the contractual rights of the appellant under its loan agreements ('Financing documents') with the Borrower i.e., respondents No. 2 and 3, to have the loans granted by it *serviced from the sale of apartments* developed by the borrowers inasmuch as the impugned order places a complete bar on the borrowers from undertaking sale of any units (even in the ordinary course of their business), thereby directly impacts the appellant's right to recover its dues from such sale.

4. The learned senior counsel for the respondent argued Dalmia

Group/respondent nos.5 to 7 had invested in nine projects of ATS group and there were different agreements executed while making the investment to the ATS group by the respondent. All the agreements can be divided into three parts ***a)*** case nos.1 to 3 *viz.* investment agreements; ***b)*** case nos.4 to 6 viz. agreements of flat buyers and buy back agreements and ***c)*** loan agreements. It is submitted the ATS group itself had filed a counter claim wherein it prayed it required to pay only Rs.*150* crores and hence vide an impugned order dated 12.10.2021 the learned arbitrator protected such Rs.*150* crores by requiring it either to secure such amount by giving of bank guarantee; or to keep some saleable flats out of nine projects unsold till bank guarantee is given. Reference was made to various provisions of agreement dated 03.09.2013 executed between the respondent; respondent no.1 M/s.Almond Infrabuild Pvt. Ltd. and Mr.Getamber Anand, director and promoter of ATS Group. Following provisions of the agreement are stated to be relevant which read as under:

> *"The Investor, Developer and the Guarantor are hereinafter individually referred to as a "Party" and collectively as "Parties".*
>
> *A. Whereas, Developer is inter alia developing a residential project named "TOURMALINE" with a saleable area of approximately 9,60,000 square feet over a parcel of land admeasuring 10.41875 acres ("Project Land") in Sector 109, Gurgaon, Haryana ("Project");*
>
> *xxx xxx*
>
> *1. AMOUNT AND PUPROSE OF THE INVESTMENT*
>
> *1.1 The Investor hereby agrees to provide a sum of Rs.15,00,00,000/- (Rupees Fifteen Crores Only) (hereinafter referred to as the "Investment Amount") to Developer for the purpose of acquisition of development of the Project i.e. developing a residential project named "TOURMALINE" with a saleable area of approximately 9,60,000 square feet over the Project Land, subject to the terms and conditions specified in this Agreement.*

2. NATURE OF INVESTMENT

2.1 In lieu of the Investment Amount made available by the Investors to Developer, Developer shall, and the Guarantor shall ensure that Developer shall, unconditionally and irrevocably transfers the ownership rights in respect of 25,000 (Twenty Five Thousand) square feet of developed land, i.e. saleable apartment space in the Project as defined in Recital A hereinabove, in the name of the Investor and/or its designated nominees.

2.2 The aforesaid ownership rights in saleable area of 25,000 (Twenty Five Thousand) square feet in the Project shall be transferred in the name of the Investor and/or its designated nominees in the form of number of apartments. For Example: If the size of one apartment will be 2,500 (Two Thousand Five Hundred) square feet of saleable area, 10 (Ten) of such apartments shall be transferred/allotted in the name of the Investor and/or its designated nominees.

3. SECURITY

3.1 The Investor shall have an exclusive charge on an area of 50,000 (Fifty Thousand) square feet of developed saleable area in the Project as security for the Investment Amount (hereinafter referred to as "Security Charge")The Security Charge shall be exercised by the Investor as ownership rights on the said area (including but not limited to the right to transfer the said area to any person in case of any default by Developer or the Guarantor of the provisions of this Agreement) till the payment of the Investment Amount and/or the Minimum Repayment Amount alongwith amounts prescribed in Clause 5.2 below, as the case may be, by Developer to the Investor in terms of the provisions of this Agreement. In respect of area covered by the Security Charge as mentioned in this clause, tower number/name, apartment size and apartment number will be informed and specified by Developer simultaneously with the execution of this Agreement.

xxx xxx

3.4 Developer shall issue two (2) cheques ("Security Cheques") at the time of disbursement of the Investment Amount in the following manner:

(i) One (1) post dated cheque amounting to Rs. 15,00,00,000/- (Rupees Fifteen Crores only) in favour of the Investor which shall bear the date which falls 37 (Thirty Seven) months from the date of disbursement of the Investment Amount; and

(ii) One (1) post dated cheque amounting to Rs. 14,17,13,472/- (Rupees Fourteen Crores Seventeen Lakhs Thirteen Thousand Four Hundred Seventy Two only) in favour of the Investor which shall bear the date which falls 37 (Thirty Seven) months from the date of disbursement of the Investment Amount; and

3.5 Developer shall provide corporate guarantee as security for fulfillment of its obligation under this Agreement to the Investor.

3.6 The Guarantor shall provide personal guarantee as security for fulfillment of the obligations of Developer under this Agreement to the Investor.

4. REPRESENTATIONS GUARANTORS AND WARRANTIES OF DEVELOPER AND THE GUARANTORS

4.1 Developer and the Guarantor jointly and severally represent and confirm the representation and warranties specified in Schedule A.

5. REPAYMENT

5.1 Developer and the Guarantor, herby affirm that Developer shall unconditionally and irrevocably buy back the ownership rights of the Investor in respect of 25,000 (Twenty Five Thousand) square feet of apartment space as mentioned in Article 2 above, for a net consideration Rs 29,17,13,472/--(Rupees Twenty Nine Crores Seventeen Lakhs Thirteen Thousand Four Hundred Seventy Two only)Minimum Repayment Amount")within 37 (Thirty Seven) months from the date of disbursement of the Investment Amount by the Investor to Developer (hereinafter referred to as "Repayment Date") such that the Investor receives a minimum fixed return of 24% p.a. compounded annually on the Investment Amount for the period of 37 months. The Minimum Repayment Amount shall be adjusted to include further amounts as specified in the Clause 5.2 below."

5. The above agreement was extended firstly on 17.04.2013 by way of first supplemental agreement; on 18.12.2018 the second supplemental agreement was executed and on 18.10.2019 the third supplemental agreement was executed. It is argued 141 flats allotments letters were issued by the ATS Group to the respondent nos.5 to 7/Dalmia Group but even these

141 flats were later sold. Further 48 flats secured vide an order dated 08.01.2021 passed in OMP(I)(C)*387/2020* were also found to be sold by the ATS Group.

6. It was argued such 141 flats of which allotment letters were initially issued in its favour were secured to it and per Section *11(4)(h)* the respondent no.1 had first charge upon those flats. Sections *11(4)* is as under:

> *"Section 11. Functions and duties of promoter.*
> *(1) to (3) xxx xxx*
> *(4) The promoter shall--*
> *(a) to (g) xxx xxx*
> *(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be; xxx xxx"*

7. However, these arguments were repealed by the learned senior counsel for the petitioner saying ***a)*** the impugned order notes such 141 flats have since been sold, thus, there is no security left and the respondent cannot claim to be a *secured* creditor; hence Section *11(4)* of RERA Act would not be applicable *qua* rights of petitioners herein.

8. The relevant terms of the facility agreements and security documents, outlining the security and the mechanism for repayment to the appellant are also set out below.

9. A Facility Agreement dated 26.12.2017 was entered into between the appellant and respondent No. 2 for a loan of Rs.*260* Crores with following clauses viz.:

(i) Details of the Borrower - Anand Divine Developers Private

Limited-Schedule 1A; ***(ii)*** Details of the Project — "'ATS Triumph' located at Sector 104, Gurgaon admeasuring 14.093 acres Schedule II; ***(iii)*** Details of Loan - A facility of Rs. *260* Crore was extended to the Borrower along with interest as indicated. Schedule 1-B; ***(iv)*** Purpose of Loan - the facility infer alia was extended for the borrower to refinance its existing outstanding facilities from ICICI Bank Limited and for financing the construction cost to complete the project-Schedule II; ***(v)*** Tenure of Loan - The tenure of the facility was to be 24 quarters from the date of first disbursement-Clause 2.10, Schedule II; ***(vi)*** Repayment of Loan - Clause 2.10. Clause 2.10 (b) - Repayment is to be made in terms of Schedule IV of the Facility Agreement. Clause 2.10 (g) - All Project *receivables of the Project-ATS Triumph are to be deposited in escrow account* as provided for under Schedule II. Clause 2.10 (h) - amounts in *escrow account are to be solely utilized for repayment*; ***(vii)*** Prepayment from project cash flow - *all cash flow* generated from the project by sale, allotment, booking etc. shall be *mandatorily credited into escrow account and utilized for prepayment* in the manner set out in the Clause 2.11; ***(viii)*** Borrower shall not withdraw any funds received from the project including funds in the escrow account until full repayment- Clause 8.14; ***(ix)*** Sales Schedule — The borrower was required to sell units as per the Sales; Schedule as set out in Schedule *XI* to ensure debt service. For every quarter from the date of disbursement, the minimum area in the project to be sold was set out. In case the borrower failed to adhere to the Sales Schedule, the appellant has a right to levy additional interest or recall the loan.

10. Security was created in favour of the appellant, in terms of the contractual clauses as below: -

> ***a)*** Clause *4.1*- Exclusive first charge by way of *mortgage on the project land* along with its development rights, both present and future. ***b)*** Exclusive first charge by way of hypothecation on the Borrower's *movable asse*ts of the Project; ***c)*** exclusive first charge by way of *hypothecation on the entire Project receivables* on account of sale of units from the Project, both present and future; ***d)*** exclusive first charge on *transferable development rights* (TDR) in connection with the Project.
>
> (ii) Undertakings by Borrower —
>
> ***a)*** Borrower shall obtain requisite NOC from the lender prior to entering into new agreements for sale with customers. All amounts *accruing* from sale shall be *deposited in Escrow Account*. Clause 8.13; ***b)*** all Project receivables and additional inflow of sale proceeds received in any manner shall be deposited into the Escrow Account. Clause 8.15; ***c)*** the Borrower undertook that till final settlement date, Borrower shall disclose in all brochures/ pamphlets/ advertising name of the lenders to whom properties are mortgaged. (Clause 8.21).

11. Pursuant to the facility agreement dated 26.12.2017, respondent No.2 executed the following security documents in favour of the appellant viz. ***(i)*** Exclusive *first charge* inter alia in respect of the *project receivables* of ATS Triumph vide a deed of hypothecation dated 26.12.2017; ***(ii)*** memorandum of Entry dated 30.01.2018; ***(iii)*** amendment agreement dated 01.02.2018 to the memorandum of *deposits of title deeds* dated 25.10.2017 (in respect of ATS Tourmaline) to effect a cross-collateralization in respect of Facility

Agreement; ***(iv)*** a second memorandum of entry dated 22.11.2019 was executed to create *mortgage on additional lands* in respect of ATS Triumph in favour of the appellant and ***(v)*** memorandum of entry and declaration dated 18.10.2021 was executed w.r.t 4.29% of the land (which was already mortgaged with the appellant) in view of certain corrections made in the underlying title deeds.

12. The *charge created in favour of the appellant* vide the security documents referred above, *was duly registered with the learned Registrar of Companies vide* (i) Deed of Hypothecation dated 26.12.2017 — Form CHG-1 for registration of charge was filed and Certificate of Registration of Charge dated 05.02.2018 having Registration Number 100151714 was issued; (ii) memorandum of entry dated 30.01.2018- Form CHG-1 for registration of charge was filed and certificate of registration of charge dated 08.02.2018 having registration number 100151714 was issued; (iii) Memorandum of entry dated 22.11.2019- Form CHG-1 for registration of charge was filed and certificate of registration of charge dated 05.12.2019 having registration number 100151714 was issued and (iv) declaration and memorandum of Entry dated 18.10.2021- Form CHG-1 for registration of charge was filed and certificate of registration of charge dated 16.11.2021 having registration number 100151714 was issued.

13. A facility agreement 29.09.2017 was also entered into between the appellant and respondent No. 2 for a loan of Rs.***190*** Crores. The relevant clauses of facility agreement dated 29.09.2017 were: (i) Details of the Borrower — Almond Infrabuild Private Limited. Schedule I-A; (ii) details of the Project — 'ATS Tourmaline' located at Sector 109, Gurgaon Schedule II; (iii) details of Loan-a facility of Rs. *190* crores was extended to

the borrower along with interest as indicated. Schedule 1-B; (iv) purpose of Loan-the facility was extended for the borrower to *refinance its existing outstanding facilities* from Yes Bank Limited and for financing the construction cost to complete the Project. Schedule II. (v) tenure of Loan-Tenure of the facility was to be 20 quarters from the date of first disbursement. Schedule II. (vi) repayment of Loan-Clause 2.10 (b) - repayment is to be made in terms of Schedule IV of the facility agreement; Clause 2.10 (g) - all Project *receivables* of the Project ATS Tourmaline are *to be deposited in escrow accou*nt as provided for under Schedule II. Clause; 2.10 (h) - amounts in escrow account are to *be solely utilized for repayment*. (vii) prepayment from project cash-flow — All cash flow generated from the project by sale, allotment, booking etc. shall be mandatorily credited into *escrow account* and *utilized for prepayment* in the manner set out in the Clause. 2.11. (viii) *borrower shall not withdraw any funds* received from the project including funds in the escrow account until full repayment. Clause 8.14. (ix) sales schedule - the borrower was required to sell units as per the sales schedule as set out in Schedule XI to ensure debt service, for every quarter from the date of disbursement, the minimum area in the Project to be sold was set out. In case the borrower failed to adhere to the sales schedule, the appellant has a right to levy additional interest and to recall the loan,

14. Security created in favour of the appellant, in terms of the contractual clauses as below:-

(i) Details of Security- Clause 4.1 read with Schedule III — The Facility Agreement *inter alia* was secured by the following as detailed in Schedule III: *Exclusive first charge* by way of *mortgage on the project land* along *with its development rights*, both present and future; exclusive first charge

by way of *hypothecation* on the *borrower's movable assets* of the project; exclusive first charge by way of hypothecation on the entire project receivables on account of sale of units from the project, both present and future. Exclusive *first charge on transferable development rights* (TDR) in connection with the project; (ii) Undertakings by Borrower — Clause 8.13 - borrower shall obtain requisite NOC from the Lender prior to entering into new agreements for sale with customers. All amounts accruing from sale shall be deposit in Escrow Account. Clause 8.15 - all project receivables and additional inflow of sale proceeds received in any manner shall be deposited into the escrow account. Clause 8.21 - the borrower undertook that till final settlement date, Borrower shall disclose in all brochures/ pamphlets/ advertising name of the lenders to whom properties are mortgaged.

15. The security documents executed by Almond Infrabuild/ Respondent No.3. Pursuant to the facility agreement dated 29.09.2017, respondent no.3 executed the following security documents in favour of the Appellant *viz.*(i) Exclusive *first charge* inter alia of the *project receivables* of ATS Tourmaline vide a deed of hypothecation dated 29.09.2017; (ii) *mortgage* on *the land, buildings and receivables of ATS Tourmaline* for which it executed a memorandum of deposit of title deeds dated 25.10.2017 and (iii) declaration cum undertaking dated 25.10.2017 in connection with such mortgage.

16. The *charge created* by Almond Infrabuild in favour of the Appellant vide the security documents referred above, was *duly registered* with the learned Registrar of Companies in the manner *viz.* (i) Deed of Hypothecation dated 29.09.2017- Form CHG-1 for registration of charge was filed and certificate of registration of charge dated 09.11.2017 having

registration number 100132113 was issued and (ii) declaration cum undertaking dated 25.10.2017- Form CHG-1 for registration of charge was filed and Certificate of registration of charges dated 18.11.2017 having registration number 100132113 was issued.

17. Form CHG-I as downloaded from the Ministry of Corporate Affairs *viz* an application for registration / creation of the charge is also filed wherein at serial number 2, the name of *Almond Infrabuild Private Limited viz* the borrower for Rs.160 Crore is mentioned and at serial number *14* the name of property / assets to be charged are mentioned along with the documents executed. The document No.6 (page No.*453*) is the certificate of charge is as under:-

GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS
Registrar of Companies, Delhi
xxx xxx

Name of the company ALMOND INFRABUILD PRIVATE LIMITED
Charge Identification Number 100132113
SRN G60678836
REF.: Creation of charge dated 2017-09-29 between ALMOND INFRABUILD PRIVATE LIMITED (first party) and L&T HOUSING FINANCE LIMITED (second party).

This is to certify that pursuant to the provisions contained in Chapter VI of the Companies Act, 2013, the above mentioned charge dated the twenty ninth day of September two thousand seventeen created by the above named company in favour of L&T HOUSING FINANCE LIMITED to secure the amount of rupees One Hundred Ninety Crore has been registered and assigned a Charge Identification Number as mentioned above in the Register of Charges, in accordance with the provisions contained in that behalf in Chapter VI of the said Act.

Given under my hand at New Delhi this ninth day of

November two thousand seventeen.

Registrar of Companies
ROC-Delhi

18. *Similar* documents were executed for the loan of Rs.260 Crores.

19. The Dalmia group has sought to rely upon investment agreements but had failed to show any document *evidencing* either *creation of security and/or the registration of charge / security* to make it a secured creditor. A purported investment agreement or a loan agreement *inter se* the parties contemplating creation of charge is not sufficient to create a charge, until such charge is actually created in law by executing necessary security documents *viz.* Mortgage Deed, Deed of Hypothecation etc. The Dalmia Group has failed to demonstrate or bring on record any document to evidence *creation and registration of charge* in support of its contention of a secured creditor. *Per contra*, the Appellant has *duly executed documents for creation of charge pursuant to its Facility Agreements* for the two projects "ATS Triumph" and "ATS Tourmaline". Subsequently, the *charge created has been duly registered* with the Registrar of Companies ("RoC") as evidenced from the CHG-1 forms and certificates of registration of charge placed on record by the appellant. In terms of the Facility Agreements entered into by the Appellant and ATS Group, the Appellant *inter alia* has an exclusive *first charge* on the *entire land, buildings and receivables of the Projects*, including first charge on *unsold units* and *receivables therefrom* and first charge on *balance receivables from sold units.*

20. The argument raised by Dalmia Group that both the Appellant and Dalmias are secured creditors of ATS Group is ex-facie untenable. Section 77(3) of the Companies Act, 2013 clearly sets out *"no charge created by a company shall be taken into account by the liquidator or any other creditor*

unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2)". Dalmia Group having failed to create/register any charge in its favour, cannot contend it is a secured creditor. Registration of charge with the RoC in terms of Section 80 of the Companies Act 2013, is a deemed notice of the charge created and puts the registered charge holder, in this case the Appellant, in a *preferential position as compared to all other unsecured creditors*. It is therefore of no consequence for the Dalmia Group to contend it entered into investment agreements with ATS Group prior to the creation of the charge by the Appellant.

21. The Dalmia group cannot claim any right in preference to the appellant by virtue of being issued the allotment letters in the projects. The provisions of the RERA as enumerated above also do not create any charge on the projects as *admittedly* being a part of the impugned order, *all the allotted units were sold by the ATS*, thus no security in fact existed in terms of Section *11(4)(r)* of RERA.

22. It is pertinent to note investment agreements relied on by the Dalmia Group has been executed with Respondent No. 3, Almond Infrabuild Private Limited and no such investment agreement with Respondent No. 2, Anand Divine Developers Private Limited has been brought on record. Even otherwise as per its own admission by Dalmias, as on the date of the Impugned Order, all units in the projects pertaining to such allotment letters and Flat Buyers' Agreements have already been sold to third parties by ATS Group. Section *11(4)(h)* of RERA merely operates to protect an allottee in relation to the units allotted to such an allottee -in as much as the promoter/ developer of the Project cannot thereafter mortgage such units to anyone

else. Therefore, Section *11(4)(h)* merely restricts creation of security on allotted units and does not create security / charge on the Project or any part thereof. Section *11(4)(h)* most certainly does not make an allottee a secured creditor with respect to other units (in respect of which it is not an allottee) or any other part of the project. Consequently, the allotments which were purportedly made in favour of Dalmia Group in respect of certain units, which admittedly stand alienated by ATS cannot come to the aid of the Dalmia Group for it to claim the status of a secured creditor with respect to such units and such allotments over certain Units (which no longer exist due to purported breach of contract by ATS and re-allotment of such units to third parties) do not make Dalmia Group a secured creditor with respect to other units/ apartments or any other part of the Project.

23. It was also the argument of the learned counsel for appellant the respondents have suppressed before the learned Arbitrator the fact relating to the exclusive first charge of the appellant. It was the argument both the ATS and Dalmia Group were aware of the security existed in favour of the appellant and that ATS group ought to have disclosed these facts before learned Arbitrator.

24. Even otherwise, Dalmia Group had deemed knowledge of the charge in favour of the appellants having been duly registered with ROC in terms of section *80* of the Companies Act, 2013, as is evident from its letters dated 04.05.2021 and 05.05.2021 stating as follows:

> *"As per information available on MCA's website and attached as Annexure 1, your esteemed institution may have a first charge / lien / mortgage on the said land and / or project (including its receivables)."*

25. Dalmia Group's knowledge is further evident from the fact that after

the Impugned Order was passed, it again wrote to the Appellant a letter dated 16.10.2021 expressly noting the existence of Appellant's prior charge and informing it of the directions passed *vide* the Impugned Order as below:

> *"As per information available on MCA's website and attached herewith as Annexure-1, your esteemed institution may have a first charge/lien/mortgage on the said land and/or project (including its receivables)."*

26. Thus it is apparent both Dalmia Group and ATS Group despite having actual knowledge of Appellant's exclusive first charge, suppressed it from the Ld. Arbitrator to obtain the Impugned Order.

27. The last argument raised by the Dalmia Group was there exist other remedies to the appellant for recovery of its debt under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or under SARFAESI Act, 2002.

28. The appellant may be entitled to exercise its rights under the SARFAESI Act, 2002 ("SARFAESI") and/or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("DRT Act") but the Impugned Order insofar as it infringes upon the contractual rights and entitlements of the appellant (an unconnected third party to an arbitration between the respondents), deserves to be set aside irrespective of any other legal rights the appellant may have. The respondents have no locus to require the appellant to exercise other legal remedies available to it, to the exclusion of its entitlement to challenge the Impugned Order directly interfering with its contractual rights and entitlements.

29. The appellant though has an option to exercise its rights under SARFAESI/ DRT Act, but it is alleged the same are not commercially viable for the Appellant since the SARFAESI/DRT Act process would involve

selling the units *en bloc* in an auction for which the pool of buyers would be very limited and would fetch a significantly lower realisation resulting in the Appellant not being able to recover the entire debt owed to it (which is *in excess of Rs 450 crores*); than if the units were sold individually by the borrowers of the Appellant i.e. Respondents 2 and 3, and the proceeds thereof be received into an escrow account and be used to service the debt owed to the Appellant.

30. It is settled in law that an arbitral tribunal has no jurisdiction to affect the rights and remedies of third party secured creditors in the course of determining disputes pending before it. This principle has also been articulated by the Hon'ble Supreme Court of India in its judgment in ***State Bank of India v. Ericsson India Private Limited and Ors., Order dated 05.04.2018 in CA No. 3613-15 of 2018.*** Therefore, the contention of Dalmia Group the principle in *Ericsson* does not apply to the present case cannot be sustained. While the Hon'ble Supreme Court observed the Impugned Order in *Ericsson* does not comply with Rule 5 and 10 of Order 38 of the Code of Civil Procedure, 1908, this was *in addition* to its finding that the arbitral tribunal could not have affected the rights of a third party secured creditor. The observations made in *SBI vs Ericsson* (supra) are as under:-

> *5. There can be no dispute that the Arbitral Tribunal* ***has no jurisdiction to affect the rights and remedies of the third party-secured creditors in the course of determining disputes pending before it****. Moreover, the impugned order does not comply with the mandate of Rules 5 and 10 of Order XXXVIII CPC. Thus, the impugned orders cannot be sustained and are accordingly set aside. It is, however, made clear that the secured creditors will proceed against the asset(s) of the debtor(s) in accordance with law. This order will not affect any of the remedies of either of the parties. We have not gone into any other issue except the*

validity of the impugned order.

31. Further in *Acqua Borewell Private Limited vs Swayam Prabha & Others* 2021 SCC OnLine SC 1065 it was held the principle of natural justice ought to be adhered to and without hearing a party no order can be passed. Admittedly, the petitioner was neither before the learned arbitral tribunal and was never put to notice.

32. In view of above, the impugned order stands modified to the extent of prayer ***(b)*** by excluding the land, buildings, units comprising *ATS Tourmaline* and *ATS Triumph* and the cash flows therefrom from the scope and operation of the Impugned Order. This order, however, shall not come in the way of respondent nos.5 to 7 to recover its dues from its borrowers except against properties *first charged* in favour of the petitioner.

33. The petition stands disposed of in above terms. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

NOVEMBER 20, 2023
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