# National Company Law Appellate Tribunal, New Delhi

## Principal Bench

### COMPANY APPEAL (AT) (Insolvency) No. 1398 of 2019

(Arising out of Order dated 08th November, 2019 passed by National Company Law Tribunal, New Delhi Bench in Company Petition (IB) No.- 266/ND/2019

**IN THE MATTER OF:**

**Mr. Ambika Prasad Sharma**
**Erstwhile director of Horizon Buildcon Pvt. Ltd. .....Appellant**
**R/o 418, Shivaji Nagar,**
**Post Office Ratangarh,**
**District Churu, Rajasthan**

**Versus**

**1. Horizon Buildcon Pvt. Ltd.**
**Through the Interim Resolution Professional**
**Mr. Sanjay Gupta**

**Having its registered office at:**
**C-36, Gulmohar Park,**
**New Delhi – 110049. ...Respondent No. 1**

**2. Mr. R. Tarkeshwar Narayanan**
**R/o: 44 – B, Gayathri Apartments**
**Sector – 9, Plot 21**
**Rohini, New Delhi – 110085. ...Respondent No. 2**

**Appellant:** **Mr. Abhimanyu Bhandari, Mr. Mangesh Krishna, Mr. Vikrant Singh and Ms. Natasha Garg, Advocates.**
**Respondents:** **Mr. Abhishek Anand and Mr. Kunal Godwani, for R-1. Mr. Aishvary Vikram, Ms. Mrinali Prasad, Mr. Vikash Chandra Shukla, Advocates for R-2.**

## J U D G E M E N T

**[Per; Shreesha Merla, Member (T)]**

1. Challenge in this Appeal is against the Impugned Order dated 08.11.2019, passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) in Company Petition (IB) No. 266/ND/2019 wherein an Application under Section 7 of the Insolvency and

Bankruptcy Code, 2016, (in short **'the IBC'**) against the first Respondent/'Corporate Debtor' Horizon Buildcon Private Limited (hereinafter referred to as 'HBPL'), was admitted. While admitting the said Application, preferred by the second Respondent/the Home Buyer, the Learned Adjudicating Authority observed as follows;

> *"14. It is an admitted fact that the M/s Horizon Concept Pvt. Ltd. (HCPL) is a marketing arm of the M/s Horizon Buildcon Pvt. Ltd. (HBPL). As per the terms and conditions mentioned at Clause-D of the Apartment Buyer Agreement dated 14.02.2014 executed between M/s Horizon Concept Pvt. Ltd. (HCPL) and Mr. R. Tarkeshwar Narayan, Financial Creditor the M/s Horizon Buildcon Pvt. Ltd. (HBPL) had empowered its marketing arm i.e. HCPL to market, sell and receive consideration amount on their behalf. Further, proceedings initiated before NCDRC and the remedy available under RERA Act are not an impediment in invoking the proceedings under Section 7 of IBC 2016.*
>
> *15. From the submissions made during the final hearing and the clarifications submitted by the Financial Creditor, it is evident that CIR process against the Horizon Concept Pvt. Ltd. (HCPL) initiated by this Tribunal is in the matter of Richa Satsangi & Anr. Versus M/s. Horizon Concept Pvt. Ltd. (IB-84/ND/2019). Clearly, the Financial Creditors in that Petition are different namely, Richa Satsangi & Anr. than the Financial Creditor in the current Petition. Further, the Financial Creditor in the current petition has given an undertaking that he has not submitted his claim with the IRP appointed in the case of M/s Horizon Concept Pvt. Ltd. Additionally, the Financial Creditor has submitted that he has filed an application bearing Diary No. 0710102144782019 for withdrawing the Insolvency Petition bearing No. CP(IB) 594/ND/2019 filed against M/s Horizon Concept Pvt. Ltd.*
>
> *16. In the facts and circumstances narrated above, the Financial Creditor has established the default on the part of the Corporate Debtor in payment of the Financial Debt. The present Petition being complete*

*and the amount of default being above Rs. 1,00,000, the Petition is admitted in terms of Section 7(5) of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code."....*

**Submissions on behalf of the Learned Counsel for the Appellant:**

2. In brief, the submissions of the Learned Counsel for the Appellant is set out as hereunder:-

- 'HBPL' and Kaveri Sahakari Awas Samiti, (the 'co-operative society') entered into a Collaboration Agreement on 28.08.2012 for development of a residential complex at Sector 86, Noida which land was owned by the co-operative society.
- On 05.07.2013, 'HBPL' and Horizon Concept Private Limited (hereinafter refer to as 'HCPL') had entered into an Assignment Agreement, by which, 'HBPL' as 'Assignor' assigned 'HCPL' as 'Assignee' all its rights and liabilities with respect to marketing and sales of the Project. On 06.07.2013, 'HBPL' and 'HCPL' entered into a Marketing Agreement for marketing the Project.
- 'HCPL' and 'HBPL' are two separate legal Corporate entities and it is 'HCPL' which is engaged in the business of selling of Units in the Project and 'HBPL' is engaged in the development and construction of the Project. The Project is not a Joint Venture of 'HBCL' and 'HCPL' and there is no tripartite Agreement between the Buyer, 'HBCL' and 'HCPL'.

- An Apartment Buyer Agreement ('ABA') dated 14.02.2014 was entered into between the Home Buyer/Allottee and 'HCPL', subsequent to which an Allotment Letter dated 25.02.2014 was issued by 'HCPL'.
- The date of delivery of possession was three years i.e. 14.02.2017, from the date of the 'ABA'. The Allottee paid an amount of Rs. 32,34,108/- out of a total sale consideration of Rs. 49,76,500/-, directly to 'HCPL'. No money has been disbursed in the account of the 'HBPL' and therefore there is no privity of contract between the Allottee and 'HBPL'.
- As there is no disbursal of money against consideration for time value of money from the Allottee to 'HBPL' there exists no 'Financial Debt'. Since the disbursal by the Allottee has been made into the account of 'HCPL', the Home Buyer is the 'Financial Creditor' for 'HCPL' and not 'HBPL'.
- There is no provision for 'Group Insolvency' in India and therefore, Application against 'HBPL' is not maintainable though 'HCPL' is the marketing arm of 'HBPL'.
- There cannot be two CIRP Proceedings in respect of the same claim and default. The 'Financial Creditor' had filed a similar Application against 'HCPL' against the same claim and default which was subsequently withdrawn by him after the admission of this Application. ***'Dr. Vishnu Kumar Agarwal' V/s. 'M/s. Piramal Enterprise Ltd.'*** has laid down that second Application for the same

set of claim and default cannot be admitted against two or more 'Corporate Debtors'.

- The default in the Project cannot be attributed to 'HBPL' and it is only an account of "Force Majeure" resulting from the Notice dated 23.09.2014 issued by Noida to stop the construction activity of the Project. The co-operative society, being the landowner, approached the Hon'ble Allahabad High Court and filed Writ C No. 53983 of 2014 impugning the Notice dated 23.09.2014. The Hon'ble High Court directed the Society to reply to the said Notice, which came to be rejected by Noida and the same was challenged before the Hon'ble High Court in Writ C No. 36329 of 2015 by the Society and the High Court vide an Order dated 03.07.2015 observed that the construction may continue but only at the risk and peril of the co-operative society. Therefore, 'HBPL' was effectively restrained from raising any construction at the Plot which subsequently delayed the construction of the Project. The Writ was disposed of by the Hon'ble High Court vide an Order dated 15.02.2016 with an observation that the Society may approach the Director of Noida against the said Notices. Thereafter the Society, being aggrieved of the Order dated 25.05.2017 of the 'CEO' of Noida preferred a Revision Petition which is pending before the Department of Infrastructure and Industrial Development, Government of Uttar Pradesh at Lucknow and till date, no Order has been passed by the said Department.

- The disputes raised by Noida led to the delay in the construction which was completely beyond the control of 'HBPL' and hence falls within the definition of 'Force Majeure', as defined under Clause 33 of the 'ABA'.
- This Tribunal in ***'Flat Buyer Association Winter Hills – 77, Gurgaon' V/s. 'Umang Realtech Pvt. Ltd.' Company Appeal (AT) (Insolvency) No. 926 of 2019*** has held that in a CIRP against a Real Estate Company, the proceedings are to be confined only to that particular Project and therefore *without prejudice,* it is submitted by the Learned Counsel that the CIRP against 'HBPL' should only be restricted to the said Project 'IRIDIA' and not to other Projects of 'HBPL'.

**Submissions on behalf of the second Respondent/Home Buyer:**

3. The submissions of the Learned Counsel for the second Respondent are summarized as hereunder:

- Only 'HBPL' has the development rights to develop the Project 'IRIDIA', as evidenced in the Agreement dated 28.08.2012 entered into between 'HBPL' and the Co-operative Society, wherein 'HBPL' has 64% share of the entire super built-up area of the said Complex. The Collaboration Agreement also provides that the permission to transfer the ownership of Flats to the perspective Flat Buyers out of the allocated share (64% of the Project), shall be done by the developer, which shows that only 'HBPL' holds the Right, Title and Interest in the said Project.

- An Agreement dated 06.07.2013 entered into between 'HBPL' and 'HCPL' is for the sole purpose of marketing the Residential Flats and the marketing Agreement especially provides that 'HCPL' is 'responsible for the marketing related facilities of 'HBPL' and will enter into arrangements on behalf of the parent Company 'HBPL'.
- 'HCPL' has no Right, Title and Interest in the said Project. 'HCPL' only works in the capacity of a marketing arm and front of 'HBPL', which is evidenced from the fact that only 'HBPL' can execute all documents which are required under law for valid execution of the sale deed of Plots in the Project.
- 'HCPL' and the 'Financial Creditor' entered into an Apartment Buyer Agreement, the covenants of which have to be read as a whole. Clause-A specifically provides that 'HBPL' has all the rights to construct the Project. Clause-B provides that developer 'HBPL' has represented that it will complete the construction of the Project in 36 months.
- Clause 1.1 of the Apartment Buyer Agreement ('ABA') states that the developer has agreed to sell the Apartment to the intending Allotees. Clause 50.3 of 'ABA' provides that the Allotee covenants with the developer to pay from time to time and at all times the amount which the Allotee is liable to pay under this Agreement. Clause 52 provides that the execution of this Agreement would be complete only upon its execution by the developer through its authorized signatory after the copies duly executed by the Allotee are received by the developer.

Although the Agreement was entered into between 'HCPL' and the 'Financial Creditor', and the money has been disbursed against consideration for time value of money to 'HCPL' it is only because 'HBPL' has approved this arrangement and it is at best a mode of payment and nothing more, as evident from Clause 50.3 of the 'ABA' wherein the Allottee covenants with the Developer to pay it the amount under this Agreement.

- The material receipt of money by 'HCPL' cannot absolve 'HBPL' form being the 'Corporate Debtor' as per the terms of the Flat Buyer Agreement, which is money received by the agent on behalf of the principal, by employee on behalf of the employer, or by money collecting agent on behalf of the entity, which is responsible under the Contract. If it is interpreted that the tangible act of deposit of money is with 'HCPL', and therefore 'HBPL' cannot be construed to be a 'Corporate Debtor', then the whole intention of bringing Home Buyers within the purview of 'IBC', is defeated.
- In the CA certificates, relating to 'funding pattern', 'HBPL' has provided for the amounts received from the Allottees at 'advances from customers' which shows that the end user is 'HBPL'.
- 'HBPL' is the entity which has committed breach in honoring the right committed to the 'Financial Creditor' in the 'ABA', resulting in a claim as defined under Section 3(6)(b). 'HBPL' has till date not been able to complete the Project, constituting a breach.

- 'HBPL' cannot claim 'Force Majeure' for the delay in the delivery of persuasion of the Flats. 'HBPL' nor 'HCPL' ever divulged pendency of any litigation to the Allottees at the time of booking the Flat. In the Order dated 15.02.2014 in Writ C No. 53983 of 2014, the Noida authorities gave an undertaking not to proceed with the show cause Notice till pendency of proceedings before the statutory authorities. Even in Order dated 03.07.2015 in Writ C No. 36329 of 2015, the Hon'ble High Court granted injunction against the Noida Authorities their proceedings. At no point of time had 'HBPL' been stopped from moving forward with the Projects, hence the defense under Clause 33 which provides for 'Force Majeure', is an afterthought.
- An FIR has been lodged by the Director of 'HCPL' against the Appellant herein on 10.08.2016 against 'HCPL' employee for offences committed during the period 05.10.2012 to 10.08.2016.
- The 'Financial Creditor' has already withdrawn the Application filed against 'HCPL' and given an undertaking before the Learned Adjudicating Authority that no 'Claim' has been preferred before the IRP of 'HCPL'. Hence it is wrong to assert that two separate Applications were filed for the same default and same set of claims.
- The Allottees are not speculative investors and are awaiting completion of their flats as they have invested their hard-earned money in this Project.

**Assessment:**

4. The main points which fall for consideration in this Appeal are:-

a. Whether the Flat Buyer is a 'Financial Creditor' vis-a-vis 'HBPL'.
b. Whether 'HBPL' falls within the ambit of the definition of 'Corporate Debtor', as defined under Section 3(8) of the Code.

5. Briefly put, the main contentions of the Learned Counsel for the Appellant are that the entire consideration was paid to 'HCPL'; that BBA is with 'HCPL'; Allotment Letter was executed with 'HCPL' all communication was only with 'HCPL' CIRP is pending against 'HCPL' and that viewed from any angle 'HBPL' cannot fall within the definition of 'Corporate Debtor' as defined under the Code.

6. To adjudicate this matter, it is relevant to ascertain the role of 'HBPL' in the Transactions and Agreements entered into between the parties namely the Allottee, 'HBPL', 'HCPL' and the landowner. It is apposite to extract the Clauses from the Agreements which are material to the case.

**Collaboration Agreement:**

7. A Collaboration Agreement dated 28.08.2012 was entered into on 28.08.2012 between 'HBPL' referred to as the 'Developer' and the Society referred to as the landowner, whereby it is stated that relying upon the assurances and declaration given by the landowners, the Developer, *'have agreed to undertake the entire planning, designing execution development and completion of the said complex in accordance with the concerned/applicable acts and rules and the plans granted/approved by the Competent Authority on the said land at its own cost and share the built-up area between the owners and the developer in the mutually agreed manner'.* This Agreement also

specifies the developer share at 64% and the owner share at 36% of the super built-up area of the said complex.

**Assignment Agreement:**

8. An Assignment Agreement was executed between 'HBPL', 'HCPL' and the landowner on 05.07.2013 whereby and whereunder 'HBPL' is referred to as 'Assignor' and 'HCPL' is referred to an 'Assignee' and the landowner as the 'Confirming Party'. It is relevant to reproduce the Clauses material to the case:-

> *"(1) The ASSIGNOR agrees to execute such other documents as may be necessary for selling and promotion of these flats in order to enable SECOND PARTY to execute the understanding(s) and arrangements(s) of this Agreement qua 64% flats on land measuring 23114 square meters in village Illahabans, Sector-86, Phase-II, Tehsil Dadri, District Gautam Budh Nagar, U.P.*
>
> *(2) The ASSIGNOR agrees that in future if ASSIGNEE will require the ASSIGNOR to execute and get registered any or all Sale Deeds in respect of the flats sold by assignee for which the assignee has received the payments, out of 64% flats on land measuring 23114 square meters in village Illahabans, Sector – 86, Phase – II, Tehsil Dadri, District Gautam Budh Nagar, U.P. then ASSIGNOR shall execute and get registered each and every Sale Deed for each and every flat with office of Sub-Registrar concerned as desired and required by the ASSIGNEE."*

9. This Assignment Agreement establishes that 'HBPL' would utilize the services of 'HCPL' qua the 64% share of the Flats in Project Horizon IRIDIA. It is only 'HBPL' which would execute and get registered any or all sale deeds in respect of the Flats sold by 'HCPL' for which 'HCPL' has received the payments.

**Marketing Agreement:**

10. A Marketing Agreement was entered into between 'HBPL' and 'HCPL' on 06.07.2013 with the main purpose of creation of 'HCPL', reproduced as hereunder;

> *"For the Marketing purpose of the above said project a subsidiary of HBPL, in the name of Horizon Concept Private Limited (hereinafter referred as HCPL) has been created. The company created so, will be responsible for the Marketing related activities of HBPL and will enter into arrangements on behalf of parent Company HBPL with other companies in this context.*
>
> *NOW THIS AGREEMENT WITNESSETH AS FOLLOWS-*
>
> *I) The HPCL would act and work in the capacity of a marketing arm and front of HBPL.*
> *II) HPCL will undertake the Marketing of flats of Project "India" and other Projects coming from time to time and will also provide advice related to construction work to HBPL in its ongoing construction project of said flats.*
> *III) That M/s Horizon Concept Private Limited is fully authorized and entitled to market/sell/allot the units and issue allotment letters/Builder Buyer Letters/and also execute Agreement to sell, receive money/monies and issue receipts thereof to the prospective buyers.*
> *IV) That all the Builder Buyer Agreements/Tripartite Agreements and/or other related documents signed/executed by HCPL prior to the date of this Agreement will be binding on HBPL And Company shall indemnify the Bank/Financial Institution/Prospective Buyers for Loss/Damage if any.*
>
> *(Emphasis Supplied)*

11. The aforenoted Marketing Agreement clearly specifies that 'HCPL' is a *creation* of 'HBPL' and is responsible for the marketing relating activities and entering into arrangements for and on behalf of the parent Company.

**Apartment Buyer Agreement:**

12. An 'ABA' was executed on 14.02.2014 between 'HCPL' and the second Respondent/Flat Buyer. This Agreement clearly stipulates that 'HBPL' is a flagship Company which has all the rights to construct the residential group housing called IRIDIA. The relevant Clauses of the Agreement are set out as hereunder;

> *"A. M/s. Horizon Buildcon Pvt. Ltd. the flagship concern of the Group has all the rights to construct the Residential Group Housing compendiously called "IRIDIA" (hereinafter being referred to as the Said Group Housing) and in possession of land parcels admeasuring 2314 Sq. meter bearing Khasra nos. 123 & 155 situated at Vill. Illabans Noida, Gautambudha Nagar by virtue of Collaboration agreement dated 28th Day of August the 2012 with land owner M/S Kaveri Sahakari Awas Samiti (hereinafter 'Said land')"…*
>
> *"C. The Developer has represented that, it will complete the construction of the Said Group Housing and make it ready of occupation and possession in all respects on or before expiry of 36 months form the date of execution of the agreement unless the construction of the same is stopped or delayed on account of factors beyond its control, as has been stipulated in the latter part of this agreement.*
>
> *D. That, Horizon Buildcon Pvt. Ltd. empowered it's marketing arm and group of company M/S Horizon Concept Pvt. Ltd. to market the Said dwelling unit, enter into agreement to sell, collect the payments against the Said Unit, executing and registering the Conveyance Deed and also do such other acts/deeds as may be necessary for confirming upon the Allottee a marketable tile to the Said Unit free from all encumbrances. The Conveyance Deed shall be in the form and content as approved by the Developer's legal advisor and shall be in favour of the Allottee. Provided that the Conveyance Deed shall be executed only upon receipt of full consideration amount of the Said Unit, Stamp Duty and Registration Charges and receipt of other dues as per these presents.*

*E. The Allottee after visiting the site and satisfying himself with regard to the price, specifications, ownership record of the Said land and all other relevant/related aspects of the project, has approached the Developer for the purchase of approximately 1150.00 Sq. Ft. equal to 106.48 Sq. Meters Super Area hereinafter referred to as the Said 104 located on the FIRST FLOOR of Orange Tower of the Said Group Housing.*

*F. The Allottee acknowledges that Developer has readily provided all information & clarifications as required by him/her but that he/she has not unduly relied upon and is not influenced by the architect's plans, sales plans, sales brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever whether written or oral, made by the Developer, its selling agents/brokers or otherwise including but not limited to any representation relating to description or physical condition of the property, its size or dimensions or any other physical characteristics thereof, the services to be provided the facilities/amenities to be made available or any other data except as specifically represented in this agreement. Further, the Allottee has relied solely on his/her own judgment and investigation in deciding to enter into this agreement for purchasing the Said Unit. No oral or written representations or statements shall be considered to be part.*

*G. The Allottees has examined the tentative building plans and all other approvals and permissions and has satisfied himself/itself about the rights and authority of the Developer to construct the Said Group Housing and allot/sell/lease or transfer the ownership rights thereof in full or in parts to third parties on such terms as they may deem fit and receive the consideration for the same"….*

*(Emphasis Supplied)*

*NOW THEREFORE IT IS AGREED AND DECLARED AS FOLLOWS:*
*"1.1. In accordance with the terms and conditions set out in this Agreement, mutually agreed to by and*

*between the parties, the Developer/Company hereby agrees to sell and the intending Allottee(s) hereby agrees to purchase the Apartment detailed below having a Super Area of approximately 1150.00 Sq. Ft. (106.84 Sq. Meters) along with undivided proportionate share in the land though not included in the computation of Super Area only underneath the Said Building in which the Said Apartment is located, calculated in the ratio which the Super Area of the Said Apartment bears to the total Super Area of all the Apartments in the Said Building; and exclusive use of the reserved covered parking space. Tower Orange Apartment No. 104 Floor No. FIRST FLOOR Super Area 1150.00 Sq. Ft. (106.84 Sq. Meters approx.) @ 850 Rate Rs. 3610.00/- per Sq. Ft. (38,858/ per Sq. Meters) amounting to Total Basic Sale Price (Rs. 41,51,500/-) (Payment Details as per Annexure E). PARKING Nos. 1.00 for Price Rs. 2,00,000/-.*

*1.2. The Basic Sale Price is escalation-free, save and except increases which the intending Allottee(s) hereby agrees to pay, due to increase in Super Area, external development chares increases on account of additional fire safety measures undertaken increases in all types of securities to be paid by the Intending Allottee(s), deposits and charges and increase thereof for bulk supply of electrical energy and all other increases in cost/charges specifically provided for in this Agreement and/or any other charges which may be levied or imposed by the Government/statutory authorities from time to time.*

*1.3. <u>The Developer/Company may allow, at its sole discretion, a rebate for early payments of installments payable by the intending Allottee(s) by discounting such early payments. The provision for rebate and the rate of rebate shall be subject to revision/withdrawal,</u> without any notice, at the sole discretion of the company"…*

*(Emphasis Supplied)*

*5. MODE OF Payment*
*"That the Intending Allottee(s) shall make all payments in time in terms of Schedule of Payments as given in Annexure C of this Agreement and as may be demanded by the Developer/Company from time to time and without any reminders from the*

*Developer/Company through A/c Payee Cheque(s)/Demand Drafts in favour of M/s Horizon Concept Pvt. Ltd. payable at New Delhi/Delhi."…*

*14. CONVEYNANCE*
*"Subject to the approval/no objection of the appropriate authority the Developer shall sell the Said Unit to the Allottee by executing and registering the Conveyance Deed and also do such other acts/deeds as may be necessary for confirming upon the Allottee a marketable title to the Said Unit free from all encumbrances. The Conveyance Deed shall be in the form and content as approved by the Developer's legal advisor and shall be in favour of the Allottee. Provided that the Conveyance Deed shall be executed only upon receipt of full consideration amount of the Said Unit, Stamp Duty and Registration Charges and receipt of other dues as per these presents."…*

*GENERAL*
*"50.3. The Allottees hereby covenants with the Developer to pay from time to time and at all time the amounts which the Allottee is liable to pay under this Agreement and to observe and perform all the covenants and conditions contained in this Agreement and to keep the Developer and its collaborators, associates, agents and representatives, estate and effects indemnified and harmless against any loss or damage that the Developer may suffer as a result of non-payment nonobservance or no-performance of the covenants and conditions stipulated in this Agreement"….*

*"52. PLACE OF EXECUTION*
*The execution of this Agreement will be complete only upon its execution by the Developer though its Authorized Signatory after the copies duly executed by the Allottee are received by the Developer. Hence, this Agreement shall be deemed to have been executed at NEW DELHI even if the Allottee has prior thereto executed this Agreement at any place(s) other than NEW DELHI, in WITNESS WHEREOF, THE PARTIES HERETO HAVE SIGNED THIS AGREEMENT AT NEW DELHI ON THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN."*

*(Emphasis Supplied)*

13. This Apartment Buyer Agreement establishes that 'HBPL' has all the rights to construct the project; that it has promised to deliver the possession of Flats within 36 months from the date of 'ABA'; that 'HCPL' is only the marketing arm of 'HBPL' that 'HBPL' has agreed in its role as a developer to sell the Flats to the intending Allottees; the maintenance of the building is to be done by 'HBPL' only 'HBPL' has a right to make additional construction and further provides for a mode of payment but does not specify whether 'HCPL' is the end user. It is significant to mention that as per Clause 50.3 the Allottees covenants with the developer to pay from time to time and at all time the amounts which the Allottee is liable to pay under this Agreement, thereby establishing that the end receiver is the developer, the developer divides the rebates to be given for early payments etc.

14. Learned Counsel appearing for the Appellant placed reliance on the ratio laid down by the Hon'ble Supreme Court in ***'Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd.' V/s. 'Axis Bank Ltd.' 2020 SCC OnLine SC 237*** in support of his case that the amount paid by the Home Buyer does not fall within the definition of 'Financial Debt' as the amount was paid to a third party. Learned Counsel drew our attention to Paras 206 & 207 wherein the Hon'ble Apex Court has observed as follows;

> ***"206.*** *As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.*

> ***207.*** *It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code."*

15. In the aforenoted case, ***'Anuj Jain, IRP for Jaypee Infratech Ltd.' (Supra)*** the 'Corporate Debtor' Jai Prakash Infrastructure Ltd. ('JIL') mortgaged some of its assets in favor of the Lender Banks/Financial Institutions for loans advanced to the Parent Company Jai Prakash Associates Infrastructure Ltd. ('JAL') thereby constituting third party security. The borrower and the security provider bore a parent and Subsidiary relationship. In this third party security, the Creditor has not disbursed any funds to the person creating the security, but instead has disbursed the funds to the Parent entity of the 'Corporate Debtor'. One of the issues in that case was whether the Respondents (Lenders of 'JAL') could be recognized as 'Financial Creditors' of the 'Corporate Debtor JIL' on the strength of the mortgage created by the 'Corporate Debtor', as collateral security of the 'debt' of its holding Company 'JAL'. The Hon'ble Supreme Court held that such Lenders of 'JAL', on the strength of the mortgages in question, may fall in the category of Secured Creditors, but such mortgages being neither towards any facilities or advance to the 'Corporate Debtor' nor towards protecting any facility or the security of the 'Corporate Debtor', it cannot be stated that the 'Corporate Debtor' owes them any 'Financial Debt' within the meaning of Section 5(8) of the Code and hence such Lenders of

'JAL' do not fall in the category of 'Financial Creditors' of the 'Corporate Debtor JIL'. The facts in the instant case are distinguishable as the matter relates to whether the Home Buyer falls within the definition of Section 5(7) of the Code vis-à-vis 'HBPL', when the amounts were collected by its marketing arm, for and on behalf of 'HBPL'. The point for consideration herein is not 'whether a third party to whom a 'Corporate Debtor' does not owe a 'Financial Debt' cannot become its 'Financial Creditor' and hence the aforenoted Judgement cannot be made applicable to the facts of the instant case with respect to this issue.

16. At this juncture, it is relevant to refer to the principle laid down by the Hon'ble Supreme Court in ***'Chairman, LIC and Ors.' V/s. 'Rajiv Kumar Bhasker' (2005) 6 SCC 188*** in which the Hon'ble Supreme Court has noted as hereunder;

> ***"24.*** *In that limited sense, the employers would be the agents of the insurer. In Bowstead & Reynolds on Agency, 17th Edn., at p. 307, it is stated:*
>
> > *"Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."*
>
> ***25.*** *Section 182 of the Contract Act, 1872 reads as under:*
>
> > *"182. 'Agent' and 'principal' defined. – An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons.*

*The person for whom such act is done, or who is so represented, is called the 'principal'."*

***26.*** *The definition of "agent" and "principal" is clear. An agent would be a person employed to do any act for another, or to represent another in dealings with third parties and the person for whom such act is done or who is so represented is called the principal. It may not be obligatory on the part of the Corporation to engage an agent in terms of the provisions of the Act and the Rules and Regulations framed thereunder, but indisputably an agent can be appointed for other purposes. Once an agent is appointed, his authority may be express or implied in terms of Section 186 of the Contract Act.*

***27.*** *For creating a contract of agency, in view of Section 185 of the Indian Contract Act, even passing of the consideration is not necessary. The consideration, however, so far as the employers are concerned as evidenced by the Scheme, was to project their better image before the employees.*

***28.*** *It is well settled that for the purpose of determining the legal nature of the relationship between the alleged principal and agent, the use of or omission of the word "agent" is not conclusive. If the employee had reason to believe that his employer was acting on behalf of the Corporation, a contract of agency may be inferred."*

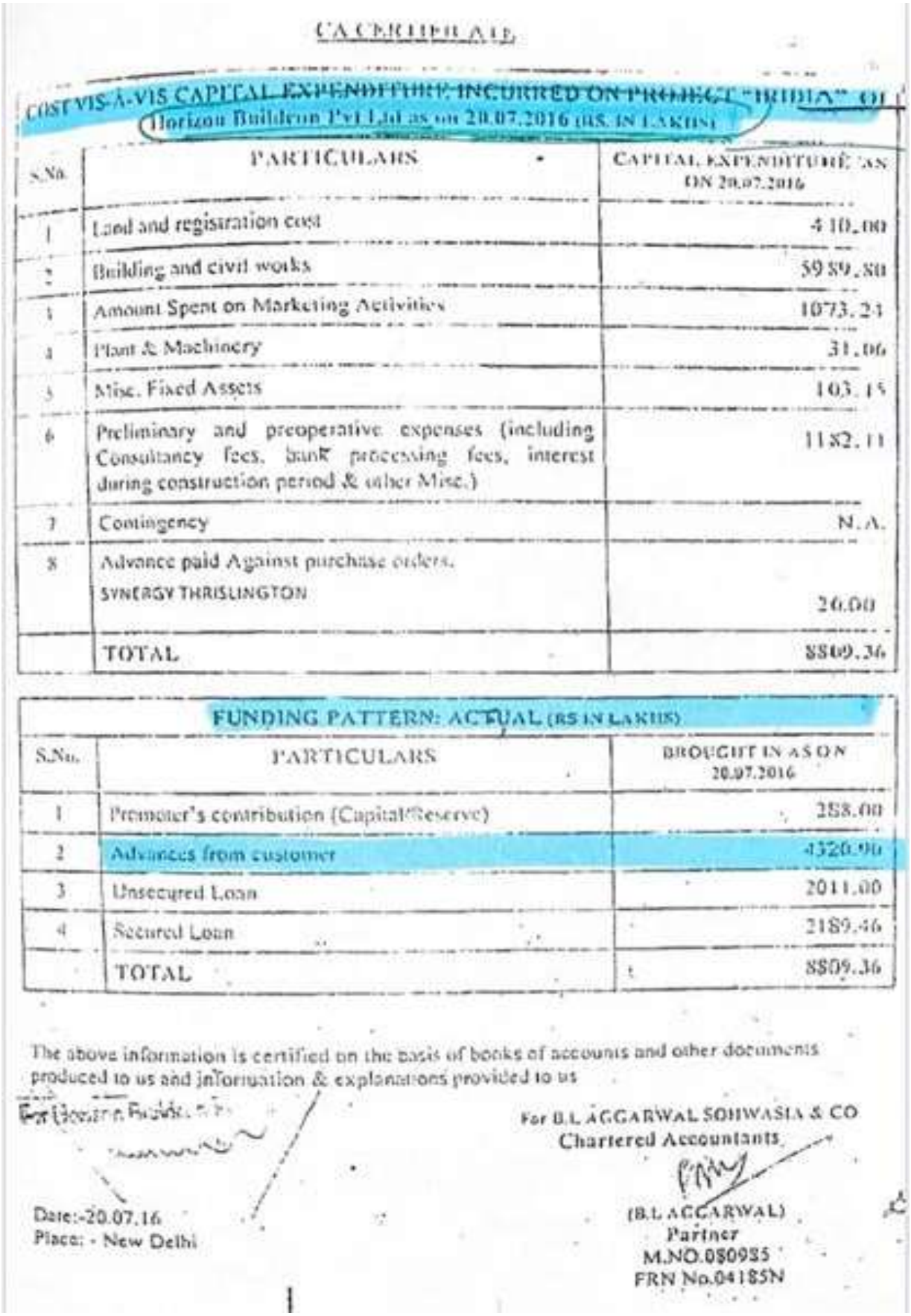
*(Emphasis Supplied)*

17. In the instant case 'HBPL' as a Principal has created 'HCPL' its marketing arm vide an Assignment Agreement dated 05.07.2013 and Marketing Agreement dated 06.07.2013 wherein 'HCPL' was authorized to enter into Agreements/arrangements on behalf of 'HBPL' and issue Allotment Letters/Builder Buyer Agreement and other related documents for and on behalf of 'HBPL'. The definition of 'agent' and 'principal' in Section 182 of the Contract Act, 1872 is crystal clear. The 'principal' and 'agent' will be held to have consented if they have agreed to a state of facts on which the

law imposes the consequences which result from agency, even if they do not recognize it themselves and even if they have professed to disclaim it. In this case, there is an **express consent** to the creation of 'HCPL' given by one party to another and it can be safely stated that there is an existence of an agent relationship. The principal in this case has placed the agent in a position (Marketing Agreement), which in the outside world is generally regarded as carrying authority to enter into transactions of the account in question. Agency is consensual not contractual. For creating a contract of agency, in view of Section 185 of the Contract Act, even passing of the consideration is not necessary. In the present case, all the Clauses of the Assignment Agreement and the Marketing Agreement entered into on 05.07.2013 and on 06.07.2013 is prior to the Apartment Buyer Agreement dated 14.02.2014. At the cost of repetition even the 'ABA' specifies that 'HBPL' is the developer which has the Rights, Title and Interest in the said Project IRIDIA. Therefore, the pleadings in the 'Rejoinder' filed by 'HBPL' that the rights in respect of the Project were assigned to 'HCPL' and it is the sole responsibility of 'HCPL' to construct and get the Project completed, is incorrect.

18. Further, the CA certificate evidences that the funding pattern of 'HBPL' provides for amounts raised from the Home Buyers under the particulars 'Advances from customer'. It is pertinent to mention here that these amounts pertain to the years 2014 to 2016, which is the significant to the facts of this case as the 'ABA Agreement' is dated February 2014 and 'HBPL' has

committed to complete the Project within 36 months from that date which ends in 2017;



CA CERTIFICATE

COST VIS-A-VIS CAPITAL EXPENDITURE INCURRED ON PROJECT "BRIDA" OF
Horizon Buildcon Pvt Ltd as on 20.07.2016 (RS. IN LAKHS)

| S.No. | PARTICULARS | CAPITAL EXPENDITURE AS ON 20.07.2016 |
|---|---|---|
| 1 | Land and registration cost | 410.00 |
| 2 | Building and civil works | 5989.80 |
| 3 | Amount Spent on Marketing Activities | 1073.24 |
| 4 | Plant & Machinery | 31.06 |
| 5 | Misc. Fixed Assets | 103.15 |
| 6 | Preliminary and preoperative expenses (including Consultancy fees, bank processing fees, interest during construction period & other Misc.) | 1182.11 |
| 7 | Contingency | N.A. |
| 8 | Advance paid Against purchase orders. SYNERGY THRISLINGTON | 26.00 |
| | TOTAL | 8809.36 |

FUNDING PATTERN: ACTUAL (RS IN LAKHS)

| S.No. | PARTICULARS | BROUGHT IN AS ON 20.07.2016 |
|---|---|---|
| 1 | Promoter's contribution (Capital/Reserve) | 258.00 |
| 2 | Advances from customer | 4320.90 |
| 3 | Unsecured Loan | 2011.00 |
| 4 | Secured Loan | 2189.46 |
| | TOTAL | 8809.36 |

The above information is certified on the basis of books of accounts and other documents produced to us and information & explanations provided to us

For Horizon Buildcon Pvt. Ltd.

For B.L AGGARWAL SOHWASIA & CO
Chartered Accountants

Date:-20.07.16
Place: - New Delhi

(B.L AGGARWAL)
Partner
M.NO.080955
FRN No.04185N

19. Now we address ourselves to whether there was any breach committed by 'HBPL' of the terms of the 'ABA'. Clause-C of the 'ABA' stipulates that the developer shall deliver possession on or before expiry of 36 months from the date of execution of 'ABA'. Hence the 'date of delivery' of possession ought to have been on or before 14.02.2017. The contention of the Learned Counsel appearing for the Appellant that the Project could not be completed on account of 'Force Majeure' is untenable specially in the light of the fact that Clause 33(b) provides for 'Force Majeure' events, stipulates a Notice to be issued informing the Allottee about the 'Force Majeure' conditions. Even otherwise, in Writ C No. 53983 of 2014, Noida Authority had given an undertaking not to proceed with the Show Cause Notice till pendency of the proceedings and further vide an Order dated 03.07.2015 in Writ C No. 36329 of 2015, the Hon'ble Allahabad High Court granted injunction against Noida Authorities from proceeding with the Show Cause Notice. This documentary evidence on record substantiates the plea of the Home Buyer that there was never any injunction for any substantial period of time, preventing 'HBPL' from continuing the construction activity of the Project. Therefore, the grounds raised by the Counsel for the Appellant with respect to 'Force Majeure', cannot be accepted. It is pertinent to mention that on a pointed query from the Bench it was admitted that the *'said Project is still incomplete'*. Hence, we are of the considered view that there is a 'breach' of the terms of the 'ABA' specifically Clause-C giving rise to a 'Claim' as defined under Section 3(6)(b) of the Code.

20. The Hon'ble Supreme Court in ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' V/s. 'Union of India & Ors.' (2019) 8 SCC 416,*** in Para 77 has laid down as follows;

> ***"77.*** *A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to lender. The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect" aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same – the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from Allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act."*

21. Explanation (i) to Section 5(8) of 'IBC' specifically provides that *'in amounts raised from an Allottee under a Real Estate Project shall be deemed to be an amount having a commercial effect of borrowings'.* Explanation (ii) further provides that the term 'Allottee' and 'Real Estate Project' used in 'IBC'

shall have the meaning as provided under Clauses (d) and (zn) of Section 2 of Real Estate (Regulation and Development Act, 2016), ('RERA').

22. Under 'RERA' Clause (d) defines Allottee in relation to a Real Estate Project as the *'person to whom a Plot, an Apartment or building as the case may be, has been allotted, sell (whether freehold or leasehold) or otherwise transferred by the promoter....'*

23. Under 'RERA' Section 2(k) defines promoter as *'a person who constructs or causes to be constructed an independent building or a building consisting of an Apartments or converts existing building apart from into an Apartment for the purpose of selling all or some of the Apartments to other persons and includes as assignee'*. The Hon'ble Supreme Court in ***'Pioneer Urban Land and Infrastructure Ltd. & Anr.' (Supra)*** in Para 100 has observed that 'RERA' is to be read harmoniously with the Code and it is only in the event of conflict that the Code will prevail over 'RERA'. Remedies that are given to Allottees of Flats/Apartments are, therefore, concurrent remedies. Section 5(8)(f) as it originally appeared in the Code, being a Residuary Provision, always subsumed within it Allottees of Flats/Apartments. To reiterate, the Clauses in the Collaboration Agreement, the Assignment Agreement, the Marketing Agreement and the Flat Buyer Agreement reproduced above evidence that 'HBPL' is the developer, 'HCPL' is its marketing arm and the amounts paid to 'HCPL' is for and on behalf of 'HBPL' and therefore, the amounts paid by the Home Buyers would fall within the definition of Section 5(8) as it carries the essential elements of disbursal and consideration for time value of money. Therefore, we are of the

considered view that 'HBPL' is the 'Corporate Debtor' and the second Respondent the 'Financial Creditor' and the amount involved is the 'Financial Debt' as defined under the Code. We find force in the contention of the Learned Counsel appearing for the Appellant that the CIRP ought to be confined only to that particular Project and it cannot affect any other Project of the same Real Estate Company. We are of the considered view that the asset of the 'Corporate Debtor Company' of that particular Project is to be maximized for balancing the Creditor such as 'Allottees', 'Financial Institutions' and 'Operational Creditors' of that particular Project.

24. Lastly, we address ourselves to the contention raised by the Learned Counsel for the Appellant that though 'HBPL' & 'HCPL' are two separate legal entities, two CIRP cannot be maintained in respect of the same claim and default. Learned Counsel placed reliance on the Judgement of this Tribunal in ***'Dr. Vishnu Kumar Agarwal' V/s. 'M/s. Piramal Enterprise Ltd.' Company Appeal (AT) (Insolvency) No. 346 of 2018,*** wherein it was held that once a Petition under Section 7 of IBC is filed against the Principal Debtor/Co-Guarantor and CIRP has been initiated, the 'Financial Creditor' cannot file another Application on the very same set of claim. It is brought to the Notice of this Bench that the Hon'ble Supreme Court in the matter of ***'Dr. Vishnu Kumar Agarwal' (Supra),*** in the Interim Order directed maintenance of status quo and in another matter stayed the Judgement of this Tribunal. The facts in the instant case are distinguishable in the sense that the issue is not regarding an admission of an Insolvency Petition against both the principal borrower as well as the guarantor. CIRP was

initiated against 'HCPL' in the matter of ***'Richa Satsangi and Ors.' V/s. 'Horizon Concept Private Limited' in CP(IB) No. 84/ND/2019*** and it is an admitted fact that the second Respondent herein has withdrawn his claim before the IRP appointed in that case. An Application was filed withdrawing the Insolvency Petition bearing No. CP(IB) 594/ND/2019 filed against 'HCPL'. Keeping these facts in view, we are of the considered opinion that the Learned Adjudicating Authority has rightly observed that the Petition filed by the second Respondent against 'HBPL' is maintainable.

25. In the result, for all the aforenoted reasons, we concur with the finding in the Impugned Order passed by the Learned Adjudicating Authority regarding the maintainability and Admission of the Section 7 Application against 'HBPL'. However, we observe that the CIRP should be Project based and be confined to the subject Project only. No order as to costs.

**[Justice Bansi Lal Bhat]**
**Acting Chairperson**

**[Dr. Ashok Kumar Mishra]**
**Member (Technical)**

**[Ms. Shreesha Merla]**
**Member (Technical)**

**NEW DELHI**
**08th April, 2021**

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