NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
COMPANY APPEAL (AT) (CH) (INS) NO. 195 / 2025
(IA No. 558 / 2025)

IN THE MATTER OF:

MR. B. NIRMAL KUMAR

47, Bazaar Road, Pallavaram,

Chennai-600043

Mobile: 9884703579

Email: raghu@credols.in **…. APPELLANT**

Vs

1. **LIC HFL TRUSTEE COMPANY PRIVATE LTD**
   Acting as trustee for LICHFL Urban Development Fund,
   Acting through its investment manager,
   LICHFL Asset Management Company Limited
   Bombay Life Building, 2nd Floor 45/47,
   Veer Nariman Road, Mumbai – 400001.
   Mobile: 9870452915
   Email: sandhya@lichflamc.com

2. **VISTRA ITCL (INDIA) LIMITED**
   (Formally IL&FS Trust Company Limited)
   Acting as Debenture trustee for LICHFL Urban
   Development Fund, IL&FS Financial Centre,
   Plot No.C22, G Block, Bandra Kurla Complex
   Bandra East, Mumbai 400051.
   Phone: N/A
   Email: litclroc@vistra.com

3. **MR. K. J. VINOD**

Resolution Professional

FLAT No B-602, Santha Towers-Phase-1,

Paruthipattu, Avadi, Chennai, 600 071.

Phone: N/A

Email: kjvinod05@rediffmail.com **…RESPONDENTS**

PRESENT :

For Appellant : Mr. G. Vairava Subramanian, Advocate
For Mr. B. Raghupathy, Advocate

For Respondents : Mr. E. Om Prakash, Senior Advocate
For Mr. MD. Srinivasan & Ms. Dharaniya Sri, Advocates for R1

WITH
COMPANY APPEAL (AT) (CH) (INS) NO. 196 / 2025
(IA No. 559 / 2025)

IN THE MATTER OF:

B. KAMLESH KUMAR

47, Bazaar Road,

Pallavaram,

Chennai – 600 043 **… APPELLANT**

Vs

1. **LIC HFL TRUSTEE COMPANY PRIVATE LTD**

Acting as trustee for LICHFL Urban Development Fund,

Acting through its investment manager,

LICHFL Asset Management Company Limited

Bombay Life Building, 2nd Floor 45/47,

Veer Nariman Road, Mumbai – 400001.

2. **VISTRA ITCL (INDIA) LIMITED**

   (Formally IL&FS Trust Company Limited)

   Acting as Debenture trustee for LICHFL Urban

   Development Fund, IL&FS Financial Centre,

   Plot No.C22, G Block, Bandra Kurla Complex

   Bandra East, Mumbai 400051.

3. **MR. K. J. VINOD**

   Resolution Professional

   FLAT No B-602, Santha Towers-Phase-1,

   Paruthipattu, Avadi, Chennai, 600 071. **…RESPONDENTS**

Present :

For Appellant : Mr. G. Vairava Subramanian, Advocate
For Mr. B. Raghupathy, Advocate

For Respondents : Mr. E. Om Prakash, Senior Advocate
For Mr. MD. Srinivasan & Ms. Dharaniya Sri, Advocates for R1

WITH
COMPANY APPEAL (AT) (CH) (INS) NO. 197 / 2025
(IA No. 560 / 2025)

IN THE MATTER OF:

MR. B. ANAND KUMAR

47, Bazaar Road,

Pallavaram,

Chennai – 600 043 **… APPELLANT**

Vs

1. **LIC HFL TRUSTEE COMPANY PRIVATE LTD**

   Acting as trustee for LICHFL Urban Development Fund,

   Acting through its investment manager,

LICHFL Asset Management Company Limited
Bombay Life Building, 2nd Floor 45/47,
Veer Nariman Road, Mumbai – 400001.

2. **VISTRA ITCL (INDIA) LIMITED**
(Formally IL&FS Trust Company Limited)
Acting as Debenture trustee for LICHFL Urban
Development Fund, IL&FS Financial Centre,
Plot No.C22, G Block, Bandra Kurla Complex
Bandra East, Mumbai 400051.

3. **MR. K. J. VINOD**
Resolution Professional
FLAT No B-602, Santha Towers-Phase-1,
Paruthipattu, Avadi, Chennai, 600 071. **…RESPONDENTS**

Present :

For Appellant : Mr. G. Vairava Subramanian, Advocate
For Mr. B. Raghupathy, Advocate

For Respondents : Mr. E. Om Prakash, Senior Advocate
For Mr. MD. Srinivasan & Ms. Dharaniya Sri,
Advocates for R1

WITH
COMPANY APPEAL (AT) (CH) (INS) NO. 198 / 2025
(IA NO. 561 / 2025)

IN THE MATTER OF:

MS. N. REKHA
47, Bazaar Road,
Pallavaram,
Chennai – 600 043 **… APPELLANT**

Vs

1. **LIC HFL TRUSTEE COMPANY PRIVATE LTD**
   Acting as trustee for LICHFL Urban Development Fund,
   Acting through its investment manager,
   LICHFL Asset Management Company Limited
   Bombay Life Building, 2nd Floor 45/47,
   Veer Nariman Road, Mumbai – 400001.

2. **VISTRA ITCL (INDIA) LIMITED**
   (Formally IL&FS Trust Company Limited)
   Acting as Debenture trustee for LICHFL Urban
   Development Fund, IL&FS Financial Centre,
   Plot No.C22, G Block, Bandra Kurla Complex
   Bandra East, Mumbai 400051.

3. **MR. K. J. VINOD**
   Resolution Professional
   FLAT No B-602, Santha Towers-Phase-1,
   Paruthipattu, Avadi, Chennai, 600 071. **…RESPONDENTS**

Present :

For Appellant : Mr. G. Vairava Subramanian, Advocate
For Mr. B. Raghupathy, Advocate

For Respondents : Mr. E. Om Prakash, Senior Advocate
For Mr. MD. Srinivasan & Ms. Dharaniya Sri,
Advocates for R1

JUDGMENT

(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

1. The Appellants, in each of these Company Appeals, appear before this Appellate Tribunal in their respective capacities as Personal Guarantors as well as Directors of M/s. JBM Homes Private Limited, the Corporate Debtor.

2. The precise facts pleaded in the instant Company Appeals by the Appellants, challenging the impugned order dated 21.03.2025 (a common date in all the appeals), are as follows: Company Petition C.P. (IB)/262/2021 is with respect to the Personal Guarantor, Mr. B. Nirmal Kumar. Another Company Petition, C.P. (IB)/260/2021, relates to Mr. B. Kamalesh Kumar, the Personal Guarantor/Director of the Corporate Debtor, who is a party in the proceedings of C.P. (IB)/260/2021. Yet another Company Petition, C.P. (IB)/259/2021, relates to Mr. B. Anand Kumar, also a Personal Guarantor/Director of the Corporate Debtor; and finally, Company Petition C.P. (IB)/261/2021 relates to Ms. N. Rekha, who likewise holds the status of Personal Guarantor/Director of the Corporate Debtor. The impugned orders have been passed in the above company petitions against the respective personal guarantors/appellants herein.

3. Before we proceed to deal with the factual aspects in each of these Company Appeals, arising from the order passed on 21.03.2025, which resulted in initiation of proceedings under Section 95 of the I&B Code, 2016, against the Personal Guarantors (the Appellants herein), it becomes necessary to note that none of the Appellants, who are the opposite parties in the Company Petitions, raised any objection as to their status as Personal Guarantors/Directors of the Corporate Debtor.

4. In accordance with the records placed before us, and as contended, Respondent Nos. 1 and 2, who are the Financial Creditors, have their head offices at Mumbai. Respondent No. 1 subscribed to Optionally Fully Convertible Debentures (OFCDs) issued by the Corporate Debtor (CD) under the Share Subscription-cum-Debenture Subscription and Shareholders Agreement (SSDSHA) dated 23.03.2015 and the related Supplementary Agreements dated 24.03.2018 and 24.07.2018. Respondent No. 2, Vistra ITCL (India) Limited, is the Debenture Trustee appointed under the Debenture Trust Deed dated 23.03.2015.

5. Respondent Nos. 1 and 2 jointly initiated proceedings under Section 95(1) of the I&B Code, 2016, read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution

Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Under these provisions, proceedings were initiated by Respondents 1 and 2 under Section 95 of the I&B Code, 2016, against the Appellants, who are Personal Guarantors of the Corporate Debtor. It is pertinent to mention that in prior proceedings, IA (IB) 812/2020, the Corporate Debtor had already been admitted into CIRP by order dated 07.09.2021; subsequently, in IA(IBC)/919/CHE/2022, an order of liquidation was passed on 12.09.2023. Neither the order initiating CIRP nor the order of liquidation, as detailed above, has been challenged by the Corporate Debtor; accordingly, for all practical purposes, the order initiating CIRP dated 07.09.2021 and the liquidation order dated 12.09.2023 have attained finality qua the Appellants.

6. When initiating proceedings under Section 95 of the I&B Code, 2016, against the Appellants (the Personal Guarantors/Directors), the Respondents had contended that Respondent No. 1 had invested an amount of Rs.18.39 crore in the CD by subscribing to 1,83,90,180 Optionally Fully Convertible Debentures (OFCD) of Rs.10/- each issued by the Corporate Debtor on which the CD defaulted and when the Personal Guarantors failed to repay the same, they filed the application before the Ld. NCLT, invoking Section 95 of the I&B Code, 2016, against the Personal Guarantors. The Appellants contended that, the Respondents have claimed a total amount of Rs. 98,64,37,800/-,

alleged to be due under Section 95(4)(a) of the I&B Code, 2016 and that there are no details in the application as to how the same was arrived at from the principal amount of ₹18.40 crore.

7. The facts revealed from the records indicate that the amount extended by the Respondents in the form of OFCD fell due on 26.09.2018. It was further contended that, since the amount fell due on 26.09.2018 and the CD defaulted on repayment, the date of default is to be construed as 27.09.2018 onwards, as stated in the proceedings filed by Respondents 1 and 2 before the Ld. NCLT.

8. In the proceedings under Section 95 of the I&B Code, 2016, the Financial Creditors (Respondents 1 and 2) asserted that the records of default filed with the Information Utility confirmed the commission of default as of 27.09.2018. Respondent No. 1 is said to have issued a formal notice of default on 09.12.2019; however, the demand notice in consonance with Section 95(4)(b) was first issued on 01.03.2021.

9. The proceedings under Section 95 of the I&B Code, 2016, were instituted by the Respondents before the Ld. NCLT on 24.09.2021, claiming a total amount of Rs. 98,64,37,800/-, based on their interpretation of the terms and conditions of SSDSSA dated 23.03.2015 and the Supplemental

Agreements dated 24.03.2018 and 24.07.2018. It is pertinent to note that the execution of these agreements, which form the basis for determining the controversy, is undisputed, and they govern the terms and conditions, including the default and the time within which the amount is to be repaid by the Corporate Debtor, for which the Appellants stood as Personal Guarantors, was to be remitted. As already noted, the demand notice under Section 95(4)(b) was issued on 01.03.2021. In this context, the Ld. Counsel for the Appellants has referred to Clause 12.2 of the Share Subscription-cum-Debenture Subscription and Shareholders Agreement (SSDSSA) dated 23.03.2015 and the consequential supplemental agreement dated 24.03.2018.

10. The Appellants contend that, in the context of Clause 12.2 of the agreement, no debt was due from the Corporate Debtor as the OFCD got automatically converted into shares when the default occurred. They further state that, in any event, since the notices relate to events up to 27.09.2018, the initiation of proceedings in September 2021 is barred by limitation. They also contend that, the Respondents had nominee directors on the board of the Corporate Debtor, and those nominee directors did not raise any issue regarding default until the demand notice of 01.03.2021. Accordingly, they contend that the inception of proceedings under Section 95 of the I&B Code, 2016, on 24.09.2021 is vitiated. In essence, they argue that the entire

proceedings under Section 95 of the I&B Code, 2016, are untenable, for the following reasons:

i) No breach of the terms and conditions of the Subscription Agreement dated 23.03.2015 and Supplemental Agreement occurred with respect to the creation of the OFCDs issued by the Corporate Debtor.

ii) No amount was due and payable by the Corporate Debtor.

iii) No event of default occurred on 27.09.2018, the date on which Respondents declared default.

iv) The proceedings are barred by limitation.

Although feebly, the Appellants also contend that the nominee directors of Respondent No. 1, who were on the board until June 2021, did not raise any issue regarding default until the event of issue of notice of default on 01.03.2021. Ultimately, the controversy now argued is whether there was a breach of the Subscription Agreement dated 23.03.2015, and whether a default occurred necessitating initiation of proceedings under Section 95 of the I&B Code, 2016.

11. Against this backdrop, proceedings were initiated under Section 95 of the I&B Code, 2016, before Ld. NCLT by Respondents 1 and 2. The Appellants were served with notice, and they entered an appearance; it is

undisputed that, after appearing, the Appellants (Respondents in the Company Petitions) filed their counter-affidavits, to which rejoinders were filed by the Respondents. Thereafter, the matter was considered by the Ld. NCLT, culminating in the order dated 21.03.2025, which is impugned in these appeals.

12. Before dealing with the respective arguments raised by the Ld. Counsel for the Appellants on the propriety of initiating proceedings under Section 95 of the I&B Code, 2016, we note that, if Section 95 of the I&B Code, 2016 is read in its entirety, the notice issued under Section 95(4)(a) on 01.03.2021, based on a detailing the default of 09.12.2019 reckoned from 27.09.2018, satisfies the conditions contemplated under Section 95(1), read with sub-sections (2) and (3). It is the creditor's prerogative to apply before the Ld. Adjudicating Authority to initiate the Insolvency Resolution Process (IRP) by filing an application meeting the parameters prescribed therein. It has never been the Appellants' case before the Ld. Adjudicating Authority that the application filed under Section 95 on 24.09.2021 breached any terms or conditions of Section 95 so as to vitiate the proceedings.

13. It is also on record and admittedly the Appellants' case that the financial assistance extended by Respondent No. 1, LICHFL Trustee

Company Limited, comprised 1,83,90,180 OFCDs of Rs. 10/- each, under a Securities Subscription-cum-Securities Holder's Agreement dated 23.03.2015. Respondent No. 2, Vistra ITCL (India) Limited, acted as Debenture Trustee under the Debenture Trust Deed dated 23.03.2015. Funds raised under the Debenture Trust Deed were in the form of OFCDs, and the joint financial assistance extended by way of OFCDs to the Corporate Debtor was intended for three real estate projects at Anakaputhur, Vandalur, and Pammal. Under the Share Subscription-cum-Debenture Subscription and Shareholders Agreement dated 23.03.2015, the foundation for proceedings under Section 95, Personal Guarantees were provided as "on-demand continuing guarantees" by the four Personal Guarantors (the Appellants in the connected Company Appeals). The OFCD dues were secured by the Personal Guarantees and, as per the agreement, were to be redeemed by the end of 36 months; this period had lapsed and was extended by the Supplemental Agreement dated 24.03.2018 to 26.09.2018. During arguments, Ld. Counsel for the Appellants drew attention to Clause 2.5 of the Share Subscription-cum-Debenture Subscription Agreement and Shareholders Agreement dated 24.03.2018. The relevant Clause 2.5 is extracted below:

> *"2.5 Clause 12.2 of the SSDSSA shall stand replaced and substituted by the following:*

"Conversion in the Event of Default: If an Event of Default occurs, on or before the expiry of 54 (fifty four) months from the First Closing Date and the Investor has not even received a minimum of 32% IRR on the Investment Amount, the Company and the Company Promoters agree that all 7328 (Seven Thousand Three Hundred and Twenty Eight) OCPS's would be automatically converted into equal number of Equity Shares of the Company and 1,84,262 (One Lakh Eighty Four Thousand Two Hundred and Sixty Two Only) OFCDs would be automatically converted into equal number of Equity Shares of the Company at par, so that upon such conversion, the Investor will hold 95.1% of the Equity Shares of the Company. It is however hereby agreed in the Company shall have a right to buy back the equity shares held by the Investor on conversion and provide an exit to the Investor by providing the exit valuation amount in terms of this Agreement."

The Appellants argue that the manner of conversion in an event of default must be construed for purposes of justifying initiation of proceedings under Section 95 of the I&B Code, 2016. They submit that Clause 2.5 of the agreement dated 24.03.2018, dealing with conversion in the event of default, cannot be read in isolation and must be read with Clause 12.2 of the agreement dated 23.03.2015, of which Clause 2.5 forms a part. The relevant Clause 12.2 of the agreement dated 23.03.2015 is extracted below:

"12.2 Conversion in the Event of Default: If an Event of Default occurs, on or before the expiry of 4 (four) years from the First Closing Date and the Investor has not even received a minimum of 32% IRR on the Investment Amount, the Company and the Company Promoters agree that all

7328 (Seven Thousand Three Hundred and Twenty Eight) OCPS's would be automatically converted into equal number of Equity Shares of the Company and 1,84,262 (One Lakh Eighty Four Thousand Two Hundred and Sixty Two Only) OFCDs would be automatically converted into equal number of Equity Shares of the Company at par, so that upon such conversion, the Investor will hold 95.1% of the Equity Shares of the Company. It is however hereby agreed in the Company shall have a right to buy back the equity shares held by the Investor on conversion and provide an exit to the Investor by providing the exit valuation amount in terms of this Agreement."

For this purpose, the Appellants emphasize that if the automatically convertible debentures are converted into an equal number of equity shares of the Company at par, the Investor would hold 95.1% of the equity shares and the debt will stand extinguished; hence, they contend that no default, in fact, occurred for the purpose of invoking personal guarantee and that as Clause 2.5 describes the Appellants as "investors" holding equity shares of the Company, they cannot be permitted to invoke personal guarantee as financial creditors.

14. It is further argued that the Company retains the right to buy back the equity shares held by the Investors upon conversion, and thereby provide an exit to the Investors based on the exit valuation amount under the agreement. For this purpose, reference is made to Clause 12.2 of the Share

Subscription-cum-Debenture Subscription and Shareholders Agreement (extracted above), executed on 23.03.2015. The Ld. Counsel for the Appellants, with respect to the implication of Clause 2.5 and the issue of default, contends that, on reading Clause 12.1 of the agreement dated 23.03.2015 (dealing with conversion of OCPSs and OFCDs), certain conditions were required to be satisfied before invocation, to be read with Schedule 9. Since none of those conditions were prevalent, no further action could be taken unless approved by the Board or shareholders, a condition precedent to conversion under Clause 12.1. They further contend that the parties authorized the Investors' nominee directors to take all necessary or incidental actions, including issuance of conversion share certificates to the Investors.

15. To substantiate the above, Ld. Counsel for the Appellants submits that decisions under Clause 12.1 of the agreement dated 23.03.2015 required satisfaction of Clause 16 (governing the constitution and composition of the Board). At this juncture, it is argued that conversion of OCPSs and OFCDs under Clause 12.1 could be undertaken only after approval of the Board/shareholders, with "Board" meaning the Board as referred to in Clause 16 of the agreement dated 23.03.2015; in the absence of such constitution, there could not have been any conversion that could be treated as the basis for

holding default and for justifying initiation under Section 95 of the I&B Code, 2016.

16. We are of the view that the interpretation of Clause 12.1 must be read harmoniously with Clause 16 of the Share Subscription and Shareholders Agreement. If, as argued by Ld. Counsel for the Appellants, there was no validly constituted Board of Directors under Clause 16, the determination required under Clause 12.1 could not have been validly made. Even if that argument were accepted, the alleged wrongful application of Clause 12.1 for determining default would itself give rise to a dispute between the Personal Guarantors/Directors (the Appellants) and the Financial Creditors (Respondents 1 and 2). In that eventuality, to conclude whether Clause 12.1 ought to have been invoked, and whether preconditions were satisfied, it would have to be examined whether any default occurred as claimed on 27.09.2018, which formed the basis for the demand notice dated 01.03.2021. The Appellants contend that, if Clause 12.1, which is binding, was not complied with due to the absence of a validly constituted Board under Clause 16, the said clauses cannot be read in isolation. They further submit that the Applicant failed to invoke Clause 21 of the agreement; without such invocation, it cannot be determined whether a default actually occurred on 27.09.2018, the basis for the demand notice dated 01.03.2021.

17. It has never been the Appellants' case at any stage that, for determining the default alleged on 27.09.2018, they sought determination under Clause 21 of the agreement (which the Appellants claim forms part of the terms governing the financial assistance extended by subscription to the OFCDs). Another aspect to consider is whether, where a first-step determination of liability under Clause 21 is required and conversion under Clause 12.4 is invoked, a dispute would arise within Clause 27 (arbitration), binding the Appellants, upon issuance of the default notice and the demand dated 01.03.2021 and subsequent filing of Section 9 proceedings on 24.09.2021. Nothing on record shows that the Appellants ever took steps to determine the alleged default by invoking Clause 21. The Appellants contend that, in fact, there was no default, and therefore, the notice for initiation under Section 95 cannot be justified. They argue that the terms of the agreement cannot lawfully be read piecemeal; rather, they must be read in their entirety, entitling the Appellants to resort to a dispute-resolution forum under Clause 27 when default was determined, which they did not do. Accordingly, in the absence of determination under Clause 21 and without resort to Clause 27, the invocation of conversion of OCPSs and OFCDs under Clause 12.1 cannot be faulted merely for want of a properly constituted Board or approvals under

Clause 12.1. Hence, the argument advanced by Ld. Counsel for the Appellants fails.

18. The second limb of the Appellants' argument is that the notice issued in Form B under the I&B Code, expressing intention to initiate proceedings under Section 95 of the I&B Code, 2016, did not mention the date of default; therefore, the notice is bad. This contention can be answered in two ways.

First, proceedings under Section 7 of the I&B Code, 2016, initiated by the Financial Creditor, culminated in the initiation of CIRP by order dated 07.09.2021. This order was not challenged by the Appellants and is undisputed. Under Section 7, the basic mandatory element is proof of default; only upon such satisfaction can CIRP be initiated. Therefore, the aspect of default now sought to be agitated on the ground that the Form B notice lacked a specific date cannot be accepted, as default has already been considered and attained finality in the Section 7 proceedings.

Second, if the notice dated 01.03.2021 (Annexure M, Volume III of the appeal records) is considered, Column IV sets out the date of default as 27.09.2018. Hence, it cannot be said that the notice lacked a default date. The records reveal that the date of default was settled and accepted by the Ld. NCLT in both the Section 7 proceedings and the present Section 95

proceedings. Accordingly, issuance of Form B on 01.03.2021, forming the basis for initiation under Section 95 of the I&B Code, 2016, cannot be faulted for want of a specific default date.

19. The Ld. Counsel for the Appellants further relied on the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, particularly the definition of **"guarantor"** under Rule 3(e), extracted below:

> *"3. (e) "guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part;"*

He also stressed the definition of **"serve"** under Rule 3(g), extracted below:

> *"(g) "serve" means sending any communication by any means, including registered post, speed post, courier or electronic form, which is capable of producing or generating an acknowledgement of receipt of such communication:*
>
> *Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily*

resides or carries on business or personally works for gain;"

20. As far as the status of **"guarantor"** under Rule 3(e) is concerned, there can be no dispute regarding the Appellants' status as Personal Guarantors, given the terms of the admitted agreements, the very agreements relied upon by the Appellants. As to service of notices under Rule 3(g), which prescribes service by registered post, speed post, etc., that aspect has no bearing at this advanced stage. Form B (Demand Notice) dated 01.03.2021 was served on the Appellants, and at no point did the Appellants contend that the notice was not served. On the contrary, they proceeded to contest the proceedings on the merits. Moreover, since demand is a precondition for initiation under Section 95 of the I&B Code, 2016, and CIRP has already been admitted, there is a deeming presumption against the Appellants that the notice was served. Nothing to the contrary can be derived at this mature stage of the proceedings.

21. In response, Ld. Senior Counsel Mr. Om Prakash, appearing for the Respondent/Financial Creditor, submitted that the Appellants' arguments concerning default, service of notice, and status as Personal Guarantors of M/s. JBM Homes Private Limited need not be examined by this Appellate Tribunal at this stage, particularly because: (i) such issues were never raised

before the Adjudicating Authority; and (ii) these are basic ingredients required to be satisfied in a Section 7 proceeding, which has already been decided against the Appellants by order dated 07.09.2021 and has attained finality. Accordingly, the twin aspects of default and service of notice are deemed to be within the Appellants' knowledge and cannot now be agitated in appeal. This is especially so because, although the liquidation order dated 12.09.2023 was appealed in CA (AT) (CH) (Ins) No. 446/2023 under Section 61 of the I&B Code, 2016, the appeal was later dismissed as withdrawn.

22. Reverting to the Appellants' contention regarding non-service of notice (based on Rule 3(g)), this controversy cannot be considered at this stage because, by the Appellants' own case after initiation under Section 95 of the I&B Code, 2016, there were settlement proposals from 30.09.2021 through 20.02.2023 (about seven attempts). This itself shows that there was a demand, a default, and an admitted debt. Since the settlement process failed and the Appellants were admitted to CIRP on 07.09.2021, the argument of non-service is now untenable. Even extracts of the Resolution Plan submitted by the Appellants amount to an admission, as seen below:

> "***1. <u>RESOLUTION APPLICANT, CORPORATE DEBTOR AND THE CAUSE OF DEFAULT OF THE CORPORATE DEBTOR</u>***

The Resolution Applicants are the Suspended Directors of the Corporate Debtor namely Mr. Kamlesh Kumar B., Mr. Nirmal Kumar B., Mr. Anand Kumar B., along with an Investor, Mr. N. Tejraj Jain. The Suspended Directors of the Corporate Debtor is in this field of construction and promoting housing units for more than a decade.

- ***Kamlesh Kumar B.,*** *Director (Suspended) JBM Homes Pvt. Ltd is a Chartered Accountant by qualification with a strong financial and business background.*
- ***Nirmal Kumar B.,*** *Director (Suspended) JBM Homes Pvt. Ltd brings in several years of experience in the construction industry.*
- ***Anand Kumar B.,*** *Director (Suspended) JBM Hornes Pvt. Ltd a registered MSME undertaking brings in the expertise of a financial business into the venture. With path-breaking ideas and creativity, he brings a strong sense of vision into the venture.*
- ***N. Tejraj Jain****, Investor, is an ace investor in various business arena for more than four decades. He has been actively involved in the business of jewellery for more than 30 years. He has been trustee of various colleges and religious charitable trusts.*

JBM HOMES PRIVATE LIMITED – CLAIMS UPDATED DATED 8TH MAY 2022 RECEIVED ON 10TH MAY 2022

a. Financial Creditors – Secured

SI No	*Name of the Claimant*	*Amount Claimed INR*	*Amount Admitted INR*
1	*LICHFL Trustee Company Limited*	*98,64,37,800*	*98,64,37,800*
2	*Reliance Home Finance Limited*	*6,48,54,691*	*6,48,54,691*
	TOTAL	*1,05,12,92,491*	*1,05,12,92,491*

23. Another argument advanced by the Respondents is that, apart from the non-service point being unavailable, long-term borrowings as secured borrowings can be established from the Balance Sheet for the year ending March 2017, showing outstanding borrowings against the present Appellants. Additionally, the financial statements for the year ending 31.03.2021 demonstrate the status of secured borrowings, as extracted below:

"Note 5: Long Term Borrowings

Particulars	*As at March 31, 2021*	*As at March 31, 2020*
Secured Borrowings		
Reliance Home Finance Ltd	*4,54,39,739*	*4,24,59,965*
Less: Current maturities of long term debt	*(4,54,39,739)*	*(4,24,59,965)*
	–	–

Note:

Terms of repayment: *Repayable in 24 Equal monthly Instalments starting from February 2019 along with interest rate 17.35% per annum. The amount mentioned as payable above, includes overdue charges for the FY 2020-21, but not overdue charges for the FY 2019-20, as these charges are disputed according to the management. The net payable amount (including Principal, Interest and other charges) is Rs. 6,10,06,825.59/- as per Statement provided by Reliance Home Finance Ltd. However based on negotiations and verbal agreement with Reliance Home Finance Ltd, the management is confident the revised payable amount is significantly lower than the amount mentioned in the current Loan Statement issued by Reliance Home Finance Ltd.*

Nature of Security:

1) Exclusive charge on developer's share of unsold and booked units in the project.

2) Exclusive charge on the scheduled receivables under the documents entered into with the customers by the Borrower, all such proceeds both present & future.

3) Exclusive charge over all rights, titles, interest, claims, benefits, demands under the project documents both present & future.

4) Exclusive charge on the escrow account, all monies credited/ deposited therein & all investments in respect thereof (in whatever form they may be).

5) Exclusive charge on the TDR - Transfer of Development Rights till the same is loaded on the project.

Note 6: Short Term Borrowings

Particulars	***As at March 31, 2021***	***As at March 31, 2020***
Secured		
Debentures – Refer note below (18,390,180 debentures of Rs. 10 each)	*18,39,01,800*	*18,39,01,800*
Unsecured		
Borrowings from Related Parties – Repayable on Demand	*5,00,00,000*	*5,00,00,000*
	23,39,01,800	*23,39,01,800*

JBM Homes Private Limited

Notes forming part of financial statements for the year ended 31st March 2021

6.1. The Company has entered into a Share subscription cum debenture subscription and shareholders agreement ('Debenture agreement') entered with LICHFL. As per the terms of the

agreement LICHFL has invested in 18,390,180 Optionally Convertible Debentures (OFCDs) of the Company at the face value of Rs. 10 each, amounting to Rs. 183,901,800 over 3 tranches for developing projects in Vandalur, Pammal and Ankapathur.

These debentures are repayable based on the redemption schedule mentioned in the debenture agreement after a period of 43 months (i.e 7 October 2018) from the date of first closing date (i.c 24 March 2015). As per paragraph 11.1 of the Debenture agreement subject to non exercise of the call option by the Company promoters and/or the third redemption by the Company, the investor shall have a right to sell all of the outstanding OFCDs on or after the expiry of the 43 months from the first closing date (i.e 7 October 2018) for an amount equal to the 'Exit Put Option' amount or after the expiry of 54 months from the first closing date (i.e 2 September 2019) for an amount equal to "Final Exit put option" as below:

Breakup of the Exit put option	***Breakup of the Final Exit put option***
The "exit put option" amount shall be an amount equal to: • *30% of the IRR on the investment amount* • *Plus additional 3% IRR on the unpaid amount*	*The "final exit put option" amount shall be an amount equal to:* • *38% of the IRR on the investment amount.*

6.2. The Optionally Fully Convertible Debentures are secured by mortgage of Immovable property developed and situated at Pammal, Anakaputur and Vandalur. The Debenture carries an interest rate of 22% and repayable in 3 years from 27 March 2015. LICHFL has, for each of the year including for the year ended 31 March, 2019 waived the annual interest due on the outstanding value of debentures. subject to the conditions that the net returns as per clause 9 of the Debenture Agreement will not be affected by the such waiver and internal rate 30% of return will remain intact. Negotiations are ongoing for the waiver of interest for the year ended 31 March, 2021. LICHFL has initiated corporate insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 and the same has been admitted by the NCLT vide Order No IBA/812/2020 dated September 7th, 2021 and Resolution Professional has been appointed."

24. Another important feature that would have a vital bearing, particularly as argued by the Ld. Counsel for the Appellant, is that no plea was ever taken by the Appellant regarding the implications of the non-invocation of the guarantee under the agreement dated 12.03.2021. It has been argued by the learned counsel for the Respondent that none of the arguments pertaining to the invocation of the personal guarantee or the notices was ever

an issue agitated before the learned Adjudicating Authority, as is apparent from the reply filed by the Appellant in the proceedings before the learned NCLT (which appears at page 749 in Volume IV of the records of the Company Appeal).

25. It may further be safely concluded that, in view of the amendment by insertion carried out in Section 5 of the I&B Code, 2016 with effect from 06.06.2018 by Act No. 26 of 2018, the same is extracted hereunder:

> "*[(5A) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;]"*

Since the Guarantors are required to be treated as a class of "Corporate Debtors", the proceedings cannot be said to be vitiated in any manner whatsoever in light of the definition of "guarantor" under Rule 3(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, which includes personal guarantors, as extracted above.

26. After hearing the learned counsel for the parties and examining the records and the Impugned Order, we are of the view that, following the appointment of the Resolution Professional on 21.03.2022, the Resolution Professional was directed by the Ld. Adjudicating Authority to examine whether the Company Petition complied with Section 97(6) of the I&B Code,

2016, and only thereafter to recommend whether it should be accepted or rejected. These directions under Section 97(6) were issued by order dated 21.03.2022. The Resolution Professional is stated to have submitted his report on 31.03.2022, wherein, in accordance with the observations contained in the report filed under Section 99 of the I&B Code, 2016, the factum of the outstanding claim and the documents establishing liability stood proved and were considered in light of the details of the debts, as observed by the Ld. Adjudicating Authority in the Impugned Order. Based on the findings recorded in the report submitted under Section 99 of the I&B Code, 2016, the Resolution Professional recommended initiation of IRP proceedings against the Personal Guarantors/Respondents, who fall within the class of Corporate Debtors in view of the amendments to the I&B Code, 2016 discussed above.

27**.** The learned Tribunal, after considering the rival submissions, also examined the issue of limitation and accordingly addressed it in Para 12.5 of the Impugned Judgment. However, we make it clear that during the hearing of this Company Appeal, the learned counsel for the Appellant expressly waived the right to address the Appellate Tribunal on the issue of limitation, which had been considered by the Ld. Adjudicating Authority in Para 12.5.

28. The learned Tribunal rightly observed that, in light of Section 128 of the Contract Act, since default stood established in view of the report

submitted by the Resolution Professional under Section 99 of the I&B Code, 2016, and since issuance and service of notice were not disputed, the liability under Section 128 of the Contract Act, arising from the agreement, is co-extensive with that of the principal debtor. Hence, the initiation of proceedings under Section 95 of the I&B Code, 2016 was correctly held to be within the ambit of the provisions of the I&B Code and the Rules framed thereunder.

29. Hence, the finding, which has been recorded by the learned Tribunal is conclusive based upon rightful appreciation of evidence and documents on record, and particularly most of the arguments, which have been extended by the learned Counsel for the Appellant, it was for the first time at this Appellant stage proceedings and since the tenacity of the argument as raised by the learned Counsel for the Appellant, it entails an appreciation of fact and evidence, and that is not been agitated before the learned Adjudicating Authority in the absence of any finding recorded with regards to the implication argued by the learned Counsel for the Appellant in the context of the covenants of the agreement, in fact, it could be said that the Appellant was trying to expand the horizon of the Company Appeal, much beyond than what was actually argued before the learned Adjudicating Authority, which cannot be permitted at this stage, particularly when it entails consideration of facts

and evidence too, before arising to any conclusion, though we have already dealt with all the questions raised by the Appellant, before this Appellate Tribunal.

30. Having said so, we have to observe that the said Agreements refer to the financial creditor as investor. This is also borne out by clause 12.2 which says that the investor should receive a minimum of 32% IRR on the investment amount. This, to some extent, dilutes the claim of the respondent that he is a financial creditor and the amount extended by them to the CD is a debt. Though debenture has been included within the definition of financial debt, OFCD is a hybrid instrument, part equity and part debt and in the instant case, it must be determined as to how much of the same will have to be treated as debt, which has not been done. Further, the claim of Rs. 98.64 crore as against the original financial assistance/investment of Rs. 18.40 crore shows that the amount has been compounded by a rate hovering around 30-32% which is an expected equity rate of return. The expected rate of return in debt instruments, especially when it is secured by assets and guarantees, is much lower. Further, the assets of the CD might have been disposed of by now. Therefore, while admission of the application under section 100 of the Code is not incorrect, Ld. NCLT may direct the RP to determine what is the actual amount due to be paid by the PGs in view of the above during

preparation of payment plan. Further, while Non-convertible Debentures (NCD) has been held to be a financial debt and Compulsorily Convertible Debentures (CCD) has been held to be a kind of equity as per the judgement of Hon'ble Apex Court in the matter of IFCI Limited vs. Sutanu Sinha & Ors in Civil Appeal No. 4929/2023, no such clear cut findings have been made in respect of OFCD which is as per existing financial literature is part-equity and part-debt and the extent of each will have to be worked out by the specific terms of Agreement in each individual case. Ld. NCLT may also determine the said aspect during the further proceedings of these company petitions."

31. Owing to the above, we do not find any merits in the Appeals, thus, the Appeals would stand "dismissed", and all Interlocutory Applications pending would also stand "closed".

32. The Registry is directed to place the copy of this order in each of the connected Company Appeals.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

10.11.2025
GKJ/MS/RS