

**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI**  
**COURT-III**

**ITEM No. 3**  
**(IB)-654(PB)/2019**

IA-836/2023, IA-6672/2023, IA-1006/2024

**IN THE MATTER OF:**

Mr. Vishal fabrics & Ors.

.... Petitioner/Applicant

Vs.

M/s. Avj Developers (India) Pvt Ltd.

.... Respondent

**Order under Section 7 of the Insolvency and Bankruptcy Code, 2016.**

**Order delivered on 14.11.2025**

**CORAM :**

**SHRI BACHU VENKAT BALARAM DAS**  
**HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN**  
**HON'BLE MEMBER (TECHNICAL)**

**HYBRID HEARING (PHYSICAL & VC)**

**PRESENT:**

For Applicant :

For the BoB : Mr. Vishal Majumdar Adv.

**ORDER**

**IA-836/2023**

This application has been listed for pronouncement.

The Applicant-Canara Bank has prayed for a direction to the Respondent No. 1/Resolution Professional to consider the Applicant-Bank as a Secured Financial Creditor and admit its claim.

The Member (Judicial) has pronounced the order dismissing the application.

The Hon'ble Member (Technical), however, has passed a dissenting order and has held that the Applicant-Bank should be treated as a Financial Creditor.

**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (TECHNICAL) :-**

*"Whether, the Canara Bank (Applicant) by virtue of the Tripartite Agreements executed with the Corporate Debtor and the Homebuyers holds a "Financial Debt" (in respect of cases where claim has not been filed by Homebuyer) within the meaning of Section 5(8) of the IBC and therefore, must be treated as a Financial Creditor in such cases, specially in light*



*of the findings of the Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 390/2023 (Canara Bank Vs. RP of AVJ Developers), decided on 09.01.2025."*

**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (JUDICIAL):-**

*"Whether, in the facts and circumstances of the case, the Applicant Bank's claim can be admitted as a Secured Financial Creditor on the basis of tripartite agreement in question."*

In view of the difference of opinion between the two Members, it is appropriate that the matter be placed before Hon'ble President for necessary directions. The Learned Registrar is requested to take necessary steps in this regard.

**IA-6672/2023**

This application has been listed for pronouncement.

The Applicant-Kotak Mahindra Bank has prayed for condonation of delay of 1480 days in filing the claim before the Respondent/Resolution Professional and to direct the Respondent/Resolution Professional to accept the claim of the Applicant to the tune of Rs. 57,90,947/- as an allottee of the Corporate Debtor in respect of the units in question.

The Member (Judicial) has pronounced the order dismissing the application.

The Hon'ble Member (Technical), however, has passed a dissenting order and has held that the Applicant-Bank should be treated as a Financial Creditor.

**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (TECHNICAL) :-**

*"Whether, the Kotak Mahindra Bank (Applicant) by virtue of the Tripartite Agreements executed with the Corporate Debtor and the Homebuyers holds a "Financial Debt" (in respect of cases where claim has not been filed by Homebuyer) within the meaning of Section 5(8) of the IBC and therefore, must be treated as a Financial Creditor in such cases, specially in light of the findings of the Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 390/2023 (Canara Bank Vs. RP of AVJ Developers), decided on 09.01.2025."*



**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (JUDICIAL):-**

*"Whether, in the facts and circumstances of the case, the prayer of the Applicant Bank seeking a direction to the Resolution Professional to accept its claim as an allottee of the Corporate Debtor can be accepted on the basis of tripartite agreement in question."*

In view of the difference of opinion between the two Members, it is appropriate that the matter be placed before Hon'ble President for necessary directions. The Learned Registrar is requested to take necessary steps in this regard.

**IA-1006/2024**

This application has been listed for pronouncement.

The Applicant-Bank of Baroda has prayed for a direction to the Respondent/Resolution Professional to accept the claims of the Applicant and to secure the assets charged to the bank.

The Member (Judicial) has pronounced the order dismissing the application.

The Hon'ble Member (Technical), however, has passed a dissenting order and has held that the Applicant-Bank should be treated as a Financial Creditor.

**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (TECHNICAL) :-**

*"Whether, the Bank of Baroda (Applicant) by virtue of the Tripartite Agreements executed with the Corporate Debtor and the Homebuyers holds a "Financial Debt" (in respect of cases where claim has not been filed by Homebuyer) within the meaning of Section 5(8) of the IBC and therefore, must be treated as a Financial Creditor in such cases, specially in light of the findings of the Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 390/2023 (Canara Bank Vs. RP of AVJ Developers), decided on 09.01.2025."*

**THE ISSUE PROPOSED FOR DETERMINATION BY HON'BLE MEMBER (JUDICIAL):-**

*"Whether, in the facts and circumstances of the case, the prayer of the Applicant Bank to direct the Resolution Professional to*



*accept the claim of the Applicant and to secure the assets charged to the bank can be allowed on the basis of tripartite agreement in question."*

In view of the difference of opinion between the two members, it is appropriate that the matter be placed before Hon'ble President for necessary directions. The Learned Registrar is requested to take necessary steps in this regard.

-Sd-

**(DR. SANJEEV RANJAN)**  
**MEMBER (TECHNICAL)**

ANAND DUBEY

-Sd-

**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**NEW DELHI BENCH, COURT-III**

IA-6672/2023

In

IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**..... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**..... CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-6672/2023:**

**KOTAK MAHINDRA BANK LIMITED**

*Through its Authorized Representative Mr. Somesh Sundriyal.*

*Having its Registered Office at:*

*27 BKC, C 27, G Block, Bandra Kurla Complex,*

*Bandra (E), Mumbai, Maharashtra-400051.*

*Having Branch Office at:*

*G-9, Vikas Puri, New Delhi-110018.*

**..... APPLICANT BANK**

**VERSUS**

**1. Mr. ANIL TAYAL**

*(Earlier RP of AVJ Developers (India) Pvt. Ltd.)*

*R/o 201, Sagar Plaza, District Centre,*

*Laxmi Nagar, New Delhi-110092.*

**..... Respondent No.1**

**2. Mr. VIVEK KUMAR**

*(Present Resolution Professional of AVJ Developers (India) Pvt. Ltd.)*

*R/o C-604, Rosewood Apartments,*

*Mayur Vihar-I, Ext., New Delhi-110091.*

**.....Respondent No.2**

**3. COMMITTEE OF CREDITORS (CoC)**

*(CoC of AVJ Developers (India) Pvt. Ltd.)*

*Office No. 106, D-248 Gali No. 10, Laxmi Nagar, Delhi-110092.*

**..... Respondent No.3**



**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For Applicant : Mr. Gulshan Kumar Sachdev

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. Mr. Vivek Kumar (RP)

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. The present Application has been filed by Kotak Mahindra Bank under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 and is seeking the following reliefs: -

*“A) Condone the delay of 1480 days in filing claim before the Respondent being the Resolution Professional; or*

*B) To direct to the RP to confirm whether PNBHFL filed a claim before the IRP/RP regarding the above-mentioned units/ Borrowers.*

*C) To direct the RP to provide the status of the above-mentioned units and whether the above-mentioned units namely- 1701,17, Tower D, AVJ Heights, Plot No. GH-12/2, Sector- Zeta-1, Greater Noida, Uttar Pradesh- 201310 have been listed for claims under the Resolution Plan.*

*D) To Direct the RP to accept the claims of the Applicant to the tune of Rs. 57,90,947/- (Rupees Fifty-Seven Lacs Ninety Thousand Nine Hundred Forty Seven Only) in stipulated FORM CA as an allottee of the Corporate Debtor in respect of the Units stated above.*

*E) Pass any further orders as Hon'ble Bench deem fit and proper.”*



2. The case of the Applicant Bank is that this Adjudicating Authority vide Order dated 21.10.2019 initiated Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s. AVJ Developers (India) Private Limited and the Respondent namely Mr. Vivek Kumar was appointed the Resolution Professional of the Corporate Debtor vide Order dated 04.10.2022 replacing Mr. Anil Tayal, the erstwhile Resolution Professional of the Corporate Debtor.
3. It is submitted that pursuant to requests of interested individuals, various credit/financing facilities were sanctioned and disbursed to fund the allotment of a few units in the project of Corporate Debtor by Punjab National Bank Housing Finance Limited (PNBHFL). Thereupon, in view of the mortgage rights created by the allottee and the permission to mortgage being granted by the Corporate Debtor having the development rights over the units after having parted with the ownership over the unit's consequent to its allotment, PNBHFL disbursed the funds directly to the Developer/Corporate Debtor for its aid and benefit. The Corporate Debtor as the developer acknowledged the valid and subsisting charge over such flats/units of PNBHFL.
4. It is submitted that the details of the Borrowers and their corresponding unit/flat details along with their Loan Account Number are mentioned in the table below: -

<b>S. No</b>	<b>Loan Account Number</b>	<b>Name of Borrowers</b>	<b>Unit/ Flat Details</b>	<b>Amount Disbursed</b>
1.	HOU/GHA/071 5/2306/77	Ranjan Chandra Dey & Smriti Dasgupta	1701, 17, Tower D, AVJ Heights, Plot No- GH- 12/2, Sector-Zeta-1, Greater Noida, Uttar Pradesh-201310.	43,41,000/-

5. It is submitted that the allottees failed to maintain the financial discipline towards the said loan accounts and in pursuance of the same, the facility accounts of the borrowers were classified as Non- Performing Asset (NPA) by PNBHFL. Further, vide Deed of Assignment dated 04.03.2023, the original lender PNBHFL assigned all the rights, title and interest in the aforesaid loan accounts along with all the underlying securities to Kotak Mahindra Bank Limited (Applicant herein) and thus the applicant has charges over all the above-mentioned units.



6. It is submitted that the applicant through various communications through E-mails and through phone raised certain queries to the resolution professional as to whether PNBHFL has filed any claim for the above-mentioned borrowers, but the IRP had never taken heed of the same.
7. It is submitted that the Applicant/Kotak Mahindra Bank Limited, being a Claimant, filed its claim aggregating to Rs. 57,90,947/- (Rupees Fifty-Seven Lacs Ninety Thousand Nine Hundred Forty-Seven Only) in Form F under Regulation 9A of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on 23.11.2023.
8. It is submitted that the Resolution Professional has not replied to any of the queries raised by the applicant and neither has accepted or rejected the claim of the applicant. Hence, the present application.
9. It is submitted that in view of the mortgage rights created by the allottee and the permission to mortgage being granted by the Corporate Debtor having the development rights over the units and having parted with the ownership over the unit's subsequent to its allotment, PNBHFL disbursed the funds directly to the Developer/ Corporate Debtor for its aid and benefit. The Corporate Debtor as the developer acknowledged the valid and subsisting charge over such flats/units of PNBHFL.
10. It is submitted that the Tripartite Agreement determines the relationship between the Corporate Debtor (Builder), the allottees/Homebuyers (Borrower) and PNBHFL. As per Clause 5 of the agreement, the Corporate Debtor had specifically agreed that if borrowers fail to pay the balance amount or in case of cancellation and/or termination of the agreement between the Builder and the Borrower and/or in the event of death of the Borrower, the entire amount advanced by the PNBHFL will be refunded by the Builder to PNBHFL forthwith. Moreover, the Builder has given its consent that PNBHFL shall have a lien on the Property. The Borrowers have to furnish the Property as security for loan to PNBHFL and create mortgage in favour of the PNBHFL, as and when the sale deed/lease deed of the Property is executed it will be sent directly to PNBHFL. Moreover, from the reading of the contents of the agreement it is crystal clear that PNBHFL has lien over all the units and also builder cannot transfer any such unit which can be transferred by the builder without getting NoC from the PNBHFL.



11. It is submitted that since the Corporate Debtor failed to complete the construction of the project and consequently the Borrowers have stopped payment of EMIs, the above-mentioned accounts of the Borrowers have turned NPA. The Applicant had filed the following Original Applications against the Corporate Debtor in respect of the abovementioned Borrowers in respect of unit D- 1701.

**Respondent/Resolution Professional's Case**

12. The Respondent/Resolution Professional filed reply affidavit dated 10.09.2024 and submitted that the present Application is devoid of any substance and merit and is liable to be dismissed *in limine* by this Adjudicating Authority.

13. It is submitted that the Erstwhile Resolution Professional made a public announcement dated 22.10.2019 in Form-A as per the terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016 ("**CIRP Regulations**"). In terms of Regulation 6(2)(c) of the CIRP Regulations, the last date for submission of proof of claim was specified as 05.11.2019. Further, the said public announcement was duly uploaded on the website of the Insolvency and Bankruptcy Board of India ("IBBI"). The Applicant filed its claim on 23.11.2023, i.e. after more than 1480 days from the last date of submission of claim i.e. 05.11.2019. Further, the resolution plan of the Corporate Debtor submitted by Mr. Vinay Jain with a voting share of 72.661% was approved by the CoC in its 14<sup>th</sup> Meeting conducted on 11.10.2021, e-voting concluded on 16.10.2021. Thereafter, on 09.11.2021, the Erstwhile Resolution Professional filed an application bearing I.A. No. 5385 of 2021 under Section 30(6) of the Code seeking approval of the Resolution Plan. In light of the judgment passed by Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another**, 2024 SCC OnLine SC 122, the Resolution plan was sent back to CoC for fresh consideration. The Resolution Plan was amended and again approved with voting share of 75.963% by the CoC in its 26<sup>th</sup> CoC meeting held on 26.06.2024, e-voting concluded on 04.07.2024. Thereafter, on 12.07.2024, the Resolution Professional filed an application bearing I.A.(Plan) No. 33 of



2024 seeking approval of the resolution plan which is pending before this Adjudicating Authority. Therefore, the claim filed by the Applicant Bank with a considerable delay cannot be admitted.

**14.** It is submitted that as per Regulation 12 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”), a creditor is required to file its claim on or before the last date mentioned in the public announcement. The proviso to Regulation 12(1) of CIRP Regulations provides as follows:

*“Provided that a creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit his claim with proof to the interim resolution professional or the resolution professional, as the case may be, up to the date of issue of request for resolution plans under regulation 36B or ninety days from the insolvency commencement date, whichever is later:*

*Provided further that the creditor shall provide reasons for delay in submitting the claim beyond the period of ninety days from the insolvency commencement.”*

The above regulation came into effect on 18.09.2023, by way of an amendment to the CIRP regulations. However, prior to the amendment, a creditor was required to submit a claim on or before the ninetieth day of the insolvency commencement date. The last date for submission of Resolution Plan in the present case was 04.03.2020 and the Applicant had filed its claim on 23.11.2023. It is contended that the said amendment is prospective in nature and cannot be applied retrospectively. Thus, the CIRP Regulation, as it stood prior to the amendment, ought to be applied in the present case. Hence, it is evident that the Applicant failed to file its claim within the stipulated timeline.

**15.** The Respondent/Resolution Professional submitted that the claim of the Applicant is not maintainable as the same does not qualify as a debt in terms of the definition of the financial debt as defined under section 5(8) of the Code as the claim has been filed with respect to the amounts disbursed for allotment of units to Homebuyers in the Project. The Applicant Bank is neither a secured nor a Financial Creditor of the Corporate Debtor. A bare reading of



the Tripartite Agreement, clearly indicate that PNBHFL had granted loan to Home Buyers and not to the Corporate Debtor.

**16.** It is contended by the Resolution Professional that the Applicant herein relied upon the Tripartite Agreements executed amongst the Homebuyer, the Applicant and the Corporate Debtor for establishing its status as "secured creditor" of the Corporate Debtor. However, the Applicant has conveniently ignored the fact that Builder's liability to refund the amount arises only if -

- a. the Builder fails to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s); or*
- b. the Builder fails to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank; or*
- c. if the Borrower fails to pay his stipulated margin amount.*

**17.** It is submitted that The Builder has neither failed to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s) nor failed to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank. Infact, the Clause 6.11 of the Resolution Plan specifically provides for handing over of flats to the homebuyers and as such, security in favour of the bank can only be created thereafter. Furthermore, the Applicant has not given any detail in its application as to how the borrower has failed to pay the margin money and as such, the Applicant cannot rely on the same without any specific pleading to that effect.

**18.** It is submitted that the Respondent has already admitted the claim of one homebuyer being Mr. Mohammad Adnan in respect of unit D-1701. However, the unit being D-1701 was allotted multiple times by the suspended management of the Corporate Debtor. In this regard, even though the names of the Borrowers, Ranjan Chandra Dey and Smriti Dasgupta, appear in the records of the Corporate Debtor, they have not filed their claims as allottees of the unit D-1701, before the Respondent. The Respondent has also submitted an affidavit dated 12.09.2023, in this regard, before this Adjudicating Authority.



## **19. Analysis and Findings**

- i. Heard the Ld. Counsel appearing for both the parties and have perused the records.
- ii. In the instant case, the Applicant has sought for condonation of delay in filling the claim with the Resolution Professional in terms of the loan account of Ranjan Chandra Dey & Smriti Dasgupta. The Resolution Professional has already admitted the claim of one homebuyer being Mr. Mohammad Adnan in respect of unit D- 1701. However, the unit being D- 1701 was allotted multiple times by the suspended management of the Corporate Debtor. In this regard, even though the names of the persons who were financed by Applicant appear in the records of the Corporate Debtor, they have not filed their claims as allottees of the unit D-1701, before the Resolution Professional.
- iii. It is the case of the Applicant that in view of the specific terms of the Tripartite Agreement entered between PNBHFL, Homebuyers and the Corporate Debtor, the Applicant assumes the character of the Financial Creditor in terms of Section 5(8) of the Code and therefore, the claim filed by the Applicant ought to be admitted by the Respondent.
- iv. The Applicant Bank relies upon the Clauses of the Tripartite Agreement dated 13.08.2015 which are reproduced as under: -

*“5. If the Borrowers desire to withdraw and/or in case of death of Borrowers and/or if Borrowers fail to pay the balance amount representing the difference between the Loan sanctioned by PNBHFL and the actual purchase price of the Property, the entire amount advanced by the PNBHFL will be refunded by the Builder to PNBHFL forthwith.*

*7. Further, the Builder, in the event of default of repayment of Loan by the Borrowers, shall on written intimation/ instructions of PNBHFL cancel the allotment of the Property of the Borrowers and refund, the entire amount advanced/funded by PNBHFL directly to PNBHFL, and the builder shall have right to recover/ forfeit the earnest money from the borrower.*



12. *The Builder has given its consent that PNBHFL shall have a lien on the Property. That the Borrowers have to furnish the Property as security for loan to PNBHFL and create mortgage in favour of the PNBHFL, as and when the sale deed/lease deed of the Property is executed it will be sent directly to PNBHFL.*

13. *The Builder will not transfer the said Property to any other member or other person without obtaining the previous written consent/NOC from PNBHFL.*

14. *Without prejudice to the rights available to PNBHFL under Clause 5 and 7 herein, in the event of default by the buyer/s or Mortgagor/s or Borrowers, if PNBHFL exercise its right to enforce the security by sale/transfer to any third party including transferring to itself, the Builder would accept the purchaser/s of the Property/PNBHFL as a the buyer (as the case may be), on such purchaser(s) /transferee complying with the necessary formalities which are required by the builder to become a transferee/ purchaser/ allottee/ owner of the property.”*

- v. The Ld. Counsel for the Applicant Bank submitted that since the Corporate Debtor failed to provide original sale deed in favour of the Borrower and/or create any security in favour of the Bank in absence of registered sale deed, the Corporate Debtor is liable to repay the debt in terms of the irrevocable and unconditional guarantee provided in the clauses above. Therefore, the Applicant Bank assumes the character of the Financial Creditor in terms of Section 5(8) of the Code.
- vi. The Ld. Counsel for the Applicant placed reliance upon the Order dated 09.01.2025 in the case of Canara Bank vs. Sh. Vivek Kumar, Resolution Professional of M/s AVJ Developers (India) Private Limited, Comp. App. (AT)(Ins) 390 of 2023, wherein the Hon'ble NCLAT referred to Clause 16 of the Tripartite Agreement executed by Canara Bank, the Corporate Debtors and the Allottees therein, to hold that there is a clear obligation to repay upon the Corporate Debtor, albeit in the event of default. It is submitted that the said Clause 16 of the Tripartite Agreement is similar



to the Clause 5 and 7 of the Tripartite Agreement executed by PNBHFL to the extent it captures the obligation of the Corporate Debtor to pay under crystalized events.

- vii. In reply, the Ld. Counsel for the Respondent/Resolution Professional submitted that the above clause applies only in the event of the failure of the builder to create a security in favour of the bank. Such an occasion would only arise after approval of the resolution plan as the builder (as Successful Resolution Applicant), would hand over the possession of the flats to the homebuyers as per clause 6.11 of the Resolution Professional.
- viii. The Ld. Counsel for the Respondent also submitted that the Hon'ble NCLAT vide its Order dated 09.01.2025 remanded the matter back to this Adjudicating Authority to decide the issue.
- ix. The Ld. Counsel for the Respondent/Resolution Professional submitted that Clause D, E and F of the Recital and Clause 1 and 4 of the Tripartite Agreement, makes it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416**. The relevant clauses of the Tripartite Agreement are reproduced as under:

*“D. The Borrowers are short of finance for purchasing the Property hence in order to make up their finance for the purchase approached PNBHFL for grant of Housing Loan. The Borrowers under the provisions of the housing loan scheme framed by the PNBHFL have applied to PNBHFL for a loan for the purchase of the Property and PNBHFL has agreed to grant a loan of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ Only) to the Borrowers (hereinafter referred to as the "Loan") subject to the terms and conditions applicable to the Loan for Purchase of Property. The Borrowers have represented that they have not availed any loan from anywhere.*

*E. PNBHFL has considered the said request with a clear understanding and an irrevocable undertaking by the Borrowers that subsequent to the disablements as requested by the Borrowers, there would be no repayment default for*



any reason whatsoever including but not limited to any concern/issues by and between the Borrowers and the Builder/Developer;

F. The Borrowers have represented, and such representation being a continuing representation, that Borrower's obligation to repay the Loan shall be a distinct and independent obligation more particularly independent of any issues/concern/ dispute of whatsoever nature between the Borrowers and Builder:

NOW THEREFORE, IN CONSIDERTAION OF MUTUAL COVENANTS HEREIN THE PARTIES HERETO AGREE AS FOLLOWS:

1. That on application for grant of Loan of the Borrowers and on receipt of intimation from the Builder that the Property has been allotted to the Borrowers, PNBHFL has sanctioned the loan for purchase of Property of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ Only) to the Borrowers according to its rules, but the actual payment in instalments will be made by PNBHFL directly to the Builder as per the norms of PNBHFL Any amount. towards purchase price in excess of the "Loan for purchase of Property" sanctioned .by PNBHFL will be paid by the Borrowers directly to the Builder as per sale agreement between the Builder and 'the Borrowers and original money receipts will be submitted to PNBHFL.

4. That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the Property to the Borrowers by the Builder. the Borrowers shall 'be liable to pay to PNBHFL regularly each month the Pre-EMIs/EMIs as laid down in the Loan Agreement signed by and between PNBHFL and the Borrowers. The Borrowers shall execute an indemnity and such other documents as may be required by PNBHFL in favour of PNBHFL in this regard.

- x. It may be noted that an amendment was made in Section 5(8)(f) of the Code to enable the Homebuyers/allottees to act as Financial Creditor



and to participate in the CoC. The Applicant Bank's case is that Clause 5 and 7 of the Tripartite Agreement in the present case agrees for payment in favour of the Applicant in terms of Section 3(6) of the Code and since, the Applicant gets a right to payment, it has to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor in terms of Clause 5 and 7 of the Tripartite Agreement.

- xi. It may be noted that the amendment brought under Section 5(8)(f) of the Code which classified the homebuyers/allottees as Financial Creditors was challenged before the Hon'ble Supreme Court and the constitutional validity of Section 5(8)(f) of the Code was upheld by the Hon'ble Supreme Court in the case of ***Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.***, reported in **(2019) 8 SCC**.
- xii. The Clause 1 and 4 of the Recital to the Tripartite Agreement in the present case is reproduced hereunder for ready reference.

*“1. That on application for grant of Loan of the Borrowers and on receipt of intimation from the Builder that the Property has been allotted to the Borrowers, PNBHFL has sanctioned the Loan for purchase of Property of Rs. \_\_ (Rupees \_\_\_\_ Only) to the Borrowers according to its rules, but the actual payment in instalments will be made by PNBHFL directly to the Builder as per the norms of PNBHFL. Any amount towards purchase prices in excess of the “Loan for purchase of Property” sanctioned by PNBHFL will be paid by the Borrowers directly to the Builder as per sale agreement between the Builder and the Borrowers and original money receipts will be submitted to PNBHFL.*

*4. That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the Property to the Borrowers by the Builder, shall be liable to pay to PNBHFL regularly each month, the pre-EMIs/EMIs as laid down in the Loan Agreement signed by and between PNBHFL and the Borrowers. The Borrowers shall execute an indemnity and such other documents as maybe required by PNBHFL in favour of PNBHFL in this regard.”*



xiii. Upon perusal of the relevant clauses of the tripartite Agreement, it is evident that the Borrower/Homebuyer has authorized the Bank to disburse the above said loan amount directly to the Builder/Corporate Debtor. This shows that the Bank has acted on the instruction of the Homebuyer and not otherwise. Therefore, the submissions made on behalf of the Applicant-Bank that the Applicant assumes the character of Financial Creditor defined under Section 5(7) of the Code just because the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default cannot be accepted.

xiv. It will be pertinent to refer to Section 5(8) of the Code at this stage, which defines the word “Financial Debt”. Clause (a) and (f) of Section 5(8) reads as under: -

*“financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

*(a) money borrowed against the payment of interest;*

*....*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation. - For the purposes of this sub-clause-*

*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

xv. From the plain reading of the above definition of ‘Financial Debt’ under Section 5(8) of the Code, 2016, it is evident that the first and foremost ingredient/requirement for classifying a debt as a financial debt is that the money must be disbursed against the consideration for the time value of money, involving borrowing with an obligation to pay interest. In the present case, the amount is raised by the Corporate Debtor from the Homebuyer and therefore, the real Financial Creditors in terms of Section 5(8)(f) of the Code are the Homebuyers as the loan was availed by the Homebuyers from the Bank which has not directly advanced the money to the Corporate Debtor and only acted on instructions of the



Homebuyers in disbursing the loan amount to the Builder. The Clause 5 and 7 of the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, entitles the Bank to recover the same can only be termed as an indemnity clause under the tripartite agreement. The mere existence of a clause in the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, does not alter the intrinsic nature of the transaction between the Bank and the Homebuyer. It is a settled principal of law that that terms of a contract/agreement cannot override or supersede statutory provisions. The provisions in a contract/agreement that conflicts with statutory mandate are generally considered invalid and unenforceable.

- xvi. It may further be added that the debt in question claimed by the PNBHFL is a Financial Debt which has been disbursed to the Corporate Debtor on the instructions of the homebuyer so as to enable the homebuyer to purchase the flat. Such an arrangement made by the Bank and the Homebuyer will not change the character of the financial debt and place the bank in the category of a Financial Creditor, as can be seen in the various clauses in the Tripartite Agreement (*supra*). These clauses in the tripartite agreement have been incorporated for the sake of convenience of the Bank. Under the Tripartite Agreement, it is the homebuyer who is availing the finance from the Bank and creating the charge in favour of the Bank by giving an undertaking to keep the bank indemnify against any loss. Therefore, the Bank cannot be termed as the Financial Creditor of the Corporate Debtor and the claim of the bank cannot be accepted as the Financial Creditor as no facility has been disbursed to the Corporate Debtor.
- xvii. In order to ascertain the treatment given to the Homebuyers who have either submitted belated claims or have not submitted any claims as well as that of the bank who is claiming to be given the status of the financial creditor in place of such Homebuyers, I have perused the Resolution Plan which is already on record and filed along with the IA (R. Plan)-33/(PB)/2024 filed by the Resolution Professional seeking approval of the Resolution Plan and pending before this Adjudicating Authority.



Although the copy of the Resolution Plan has not been placed on record in the instant application, however, in order to determine the issue involved, it is appropriate to refer and rely on the Resolution Plan which is part of the IA (R. Plan)-33/(PB)/2024.

xviii. **The relevant paragraph of the Resolution Plan is Para 9.7 of Chapter 9: -**

*“Settlement of Outstanding Liability of the Resolution Plan, deals with the claims of the Banks against Homeloans and Tripartite agreement with Flat owners.”*

Sub-clause (a) of Paragraph 9.7 of the Resolution Plan reads as under:

*“(a) The separate details in this regard has not been given in the IM, but the claim lodged or to be lodged by the bank on the strength of Tripartite Agreement shall be treated as unsecured creditor and shall be settled by Resolution Applicant which will be paid in 2 quarterly equal instalments after 365 days from the date of approval of the Resolution Plan by the Hon'ble NCLT.”*

Sub-clause (b) of Paragraph 9.7 of the resolution plan reads as under:

*“(b) For the banks who have been subrogated in the position of flat owners by virtue of right exercised under tripartite agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be pay off as unsecured creditors as mentioned in Chapter-6.”*

xix. A perusal of the sub clause (a) of Para 9.7 of the Resolution Plan shows that the claim, if any be lodged by the Bank on the strength of Tripartite Agreement shall be treated as unsecured creditor. The clause (b) of Para 9.7 of the Resolution Plan stipulates that banks who have been subrogated in the position of flat owners by virtue of right exercise under the tripartite agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be paid off as unsecured creditors as mentioned in Chapter VI of the Resolution Plan.

xx. At this stage, it may be clarified that no view or opinion is being expressed with respect to the Resolution Plan, even though certain paragraphs of the Resolution Plan have been referred to.



xxi. In view of the foregoing discussion, the prayers of the Applicant-Bank in the present case cannot be allowed. Therefore, the present application is **dismissed**.

No order as to costs

**-Sd/-**

**(BACHU VENKAT BALARAM DAS)  
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**NEW DELHI BENCH, COURT-III**

IA-6672/2023  
In  
IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**..... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**..... CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-6672/2023:**

**KOTAK MAHINDRA BANK LIMITED**

*Through its Authorized Representative Mr. Somesh Sundriyal.*

*Having its Registered Office at:*

*27 BKC, C 27, G Block, Bandra Kurla Complex,*

*Bandra (E), Mumbai, Maharashtra-400051.*

*Having Branch Office at:*

*G-9, Vikas Puri, New Delhi-110018.*

**..... APPLICANT BANK**

**VERSUS**

**1. Mr. ANIL TAYAL**

*(Earlier RP of AVJ Developers (India) Pvt. Ltd.)*

*R/o 201, Sagar Plaza, District Centre,*

*Laxmi Nagar, New Delhi-110092.*

**..... Respondent No.1**

**2. Mr. VIVEK KUMAR**

*(Present Resolution Professional of AVJ Developers (India) Pvt. Ltd.)*

*R/o C-604, Rosewood Apartments,*

*Mayur Vihar-I, Ext., New Delhi-110091.*

**.....Respondent No.2**

**3. COMMITTEE OF CREDITORS (CoC)**

*(CoC of AVJ Developers (India) Pvt. Ltd.)*

*Office No. 106, D-248 Gali No. 10, Laxmi Nagar, Delhi-110092.*

**..... Respondent No.3**



**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For Applicant : Mr. Gulshan Kumar Sachdev

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. Mr. Vivek Kumar (RP)

**ORDER**

**PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)**

1. I have the advantage of going through the order authored by my Learned Brother Member (J). I have perused the comprehensive order and with utmost respect to the views expressed by my learned brother on the Bench, I find myself unable to concur with the opinion
2. The present Application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by the Applicant/Kotak Mahindra Bank and is seeking the following reliefs: -

*“A) Condone the delay of 1480 days in filing claim before the Respondent being the Resolution Professional; or*

*B) To direct to the RP to confirm whether PNBHFL filed a claim before the IRP/RP regarding the above-mentioned units/Borrowers.*

*C) To direct the RP to provide the status of the above-mentioned units and whether the above-mentioned units namely- 1701,17, Tower D, AVJ Heights, Plot No. GH-12/2, Sector- Zeta-1, Greater Noida, Uttar Pradesh- 201310 have been listed for claims under the Resolution Plan.*

*D) To Direct the RP to accept the claims of the Applicant to the tune of Rs. 57,90,947/- (Rupees Fifty-Seven Lacs Ninety Thousand Nine Hundred Forty Seven Only) in stipulated FORM*



CA as an allottee of the Corporate Debtor in respect of the Units stated above.

E) Pass any further orders as Hon'ble Bench deem fit and proper.”

3. It is the case of the Applicant Bank that the Applicant/Kotak Mahindra Bank Limited, being a Claimant, filed its claim aggregating to Rs. 57,90,947/- (Rupees Fifty-Seven Lacs Ninety Thousand Nine Hundred Forty-Seven Only) in Form F under Regulation 9A of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on 23.11.2023. The Respondent/Resolution Professional did not reply to the said E-mail and have neither accepted nor rejected the claim of the Applicant.
4. It is submitted that the details of the Borrowers and their corresponding unit/flat details along with their Loan Account Number are mentioned in the table below: -

S. No	Loan Account Number	Name of Borrowers	Unit/ Flat Details	Amount Disbursed
1.	HOU/GHA/07 15/2306/77	Ranjan Chandra Dey & Smriti Dasgupta	1701, 17, Tower D, AVJ Heights, Plot No- GH-12/2, Sector-Zeta- 1, Greater Noida, Uttar Pradesh-201310.	43,41,000/-

5. It is submitted that the allottees failed to maintain the financial discipline towards the said loan accounts and in pursuance of the same, the facility accounts of the borrowers were classified as Non- Performing Asset (NPA) by PNBHFL. Further, vide Deed of Assignment dated 04.03.2023, the original lender PNBHFL assigned all the rights, title and interest in the aforesaid loan accounts along with all the underlying securities to Kotak Mahindra Bank Limited (Applicant herein) and thus the applicant has charges over all the above-mentioned units.
6. It is submitted that in view of the mortgage rights created by the allottee and the permission to mortgage being granted by the Corporate Debtor having



the development rights over the units and having parted with the ownership over the unit's subsequent to its allotment, PNBHFL disbursed the funds directly to the Developer/ Corporate Debtor for its aid and benefit. The Corporate Debtor as the developer acknowledged the valid and subsisting charge over such flats/units of PNBHFL.

7. It is submitted that the Tripartite Agreement determines the relationship between the Corporate Debtor (Builder), the allottees/Homebuyers (Borrower) and PNBHFL. As per Clause 5 of the agreement, the Corporate Debtor had specifically agreed that if borrowers fail to pay the balance amount or in case of cancellation and/or termination of the agreement between the Builder and the Borrower and/or in the event of death of the Borrower, the entire amount advanced by the PNBHFL will be refunded by the Builder to PNBHFL forthwith. Moreover, the Builder has given its consent that PNBHFL shall have a lien on the Property. The Borrowers have to furnish the Property as security for loan to PNBHFL and create mortgage in favour of the PNBHFL, as and when the sale deed/lease deed of the Property is executed it will be sent directly to PNBHFL. Moreover, from the reading of the contents of the agreement it is crystal clear that PNBHFL has lien over all the units and also builder cannot transfer any such unit which can be transferred by the builder without getting NoC from the PNBHFL.
8. The Respondent/Resolution Professional submitted that the claim of the Applicant is not maintainable as the same does not qualify as a debt in terms of the definition of the financial debt as defined under section 5(8) of the Code as the claim has been filed with respect to the amounts disbursed for allotment of units to Homebuyers in the Project. The Applicant Bank is neither a secured nor a Financial Creditor of the Corporate Debtor. A bare reading of the Tripartite Agreement, clearly indicate that PNBHFL had granted loan to Home Buyers and not to the Corporate Debtor.
9. It is contended by the Resolution Professional that the Applicant herein relied upon the Tripartite Agreements executed amongst the Homebuyer, the Applicant and the Corporate Debtor for establishing its status as "secured creditor" of the Corporate Debtor. However, the Applicant has conveniently ignored the fact that Builder's liability to refund the amount arises only if -



- a. *the Builder fails to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s); or*
- b. *the Builder fails to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank; or*
- c. *if the Borrower fails to pay his stipulated margin amount.*

**10.** It is submitted that The Builder has neither failed to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s) nor failed to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank. Infact, the Clause 6.11 of the Resolution Plan specifically provides for handing over of flats to the homebuyers and as such, security in favour of the bank can only be created thereafter. Furthermore, the Applicant has not given any detail in its application as to how the borrower has failed to pay the margin money and as such, the Applicant cannot rely on the same without any specific pleading to that effect.

**11.** It is submitted that the Respondent has already admitted the claim of one homebuyer being Mr. Mohammad Adnan in respect of unit D-1701. However, the unit being D-1701 was allotted multiple times by the suspended management of the Corporate Debtor. In this regard, even though the names of the Borrowers, Ranjan Chandra Dey and Smriti Dasgupta, appear in the records of the Corporate Debtor, they have not filed their claims as allottees of the unit D-1701, before the Respondent. The Respondent has also submitted an affidavit dated 12.09.2023, in this regard, before this Adjudicating Authority.

**12.** The Applicant Bank relies upon the Clauses of the Tripartite Agreement dated 13.08.2015 which are reproduced as under: -

*“5. If the Borrowers desire to withdraw and/or in case of death of Borrowers and/or if Borrowers fail to pay the balance amount representing the difference between the Loan sanctioned by PNBHFL and the actual purchase price of the*



*Property, the entire amount advanced by the PNBHFL will be refunded by the Builder to PNBHFL forthwith.*

*7. Further, the Builder, in the event of default of repayment of Loan by the Borrowers, shall on written intimation/ instructions of PNBHFL cancel the allotment of the Property of the Borrowers and refund, the entire amount advanced/funded by PNBHFL directly to PNBHFL, and the builder shall have right to recover/ forfeit the earnest money from the borrower.*

*12. The Builder has given its consent that PNBHFL shall have a lien on the Property. That the Borrowers have to furnish the Property as security for loan to PNBHFL and create mortgage in favour of the PNBHFL, as and when the sale deed/lease deed of the Property is executed it will be sent directly to PNBHFL.*

*13. The Builder will not transfer the said Property to any other member or other person without obtaining the previous written consent/ NOC from PNBHFL.*

*14. Without prejudice to the rights available to PNBHFL under Clause 5 and 7 herein, in the event of default by the buyer/s or Mortgagor/s or Borrowers, if PNBHFL exercise its right to enforce the security by sale/transfer to any third party including transferring to itself, the Builder would accept the purchaser/s of the Property/PNBHFL as a the buyer (as the case may be), on such purchaser(s) /transferee complying with the necessary formalities which are required by the builder to become a transferee/ purchaser/ allottee/ owner of the property.”*

**13.** The Ld. Counsel for the Applicant Bank submitted that since the Corporate Debtor failed to provide original sale deed in favour of the Borrower and/or create any security in favour of the Bank in absence of registered sale deed, the Corporate Debtor is liable to repay the debt in terms of the irrevocable and unconditional guarantee provided in the clauses above. Therefore, the



Applicant Bank assumes the character of the Financial Creditor in terms of Section 5(8) of the Code.

14. The Ld. Counsel for the Applicant placed reliance upon the Order dated 09.01.2025 in the case of Canara Bank vs. Sh. Vivek Kumar, Resolution Professional of M/s AVJ Developers (India) Private Limited, Comp. App. (AT)(Ins) 390 of 2023, wherein the Hon'ble NCLAT referred to Clause 16 of the Tripartite Agreement executed by Canara Bank, the Corporate Debtors and the Allottees therein, to hold that there is a clear obligation to repay upon the Corporate Debtor, albeit in the event of default. It is submitted that the said Clause 16 of the Tripartite Agreement is similar to the Clause 5 and 7 of the Tripartite Agreement executed by PNBHFL to the extent it captures the obligation of the Corporate Debtor to pay under crystalized events.
15. In reply, the Ld. Counsel for the Respondent/Resolution Professional submitted that the above clause applies only in the event of the failure of the builder to create a security in favour of the bank. Such an occasion would only arise after approval of the resolution plan as the builder (as Successful Resolution Applicant), would hand over the possession of the flats to the homebuyers as per clause 6.11 of the Resolution Professional.
16. The Ld. Counsel for the Respondent/Resolution Professional submitted that Clause D, E and F of the Recital and Clause 1 and 4 of the Tripartite Agreement, makes it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416***. The relevant clauses of the Tripartite Agreement are reproduced as under:

*“D. The Borrowers are short of finance for purchasing the Property hence in order to make up their finance for the purchase approached PNBHFL for grant of Housing Loan. The Borrowers under the provisions of the housing loan scheme framed by the PNBHFL have applied to PNBHFL for a loan for the purchase of the Property and PNBHFL has agreed to grant a loan of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ Only) to the Borrowers (hereinafter referred to as the "Loan") subject to the terms and conditions applicable to the Loan for Purchase of*



*Property. The Borrowers have represented that they have not availed any loan from anywhere.*

*E. PNBHFL has considered the said request with a clear understanding and an irrevocable undertaking by the Borrowers that subsequent to the disablements as requested by the Borrowers, there would be no repayment default for any reason whatsoever including but not limited to any concern/issues by and between the Borrowers and the Builder/Developer;*

*F. The Borrowers have represented, and such representation being a continuing representation, that Borrower's obligation to repay the Loan shall be a distinct and independent obligation more particularly independent of any issues/concern/ dispute of whatsoever nature between the Borrowers and Builder:*

*NOW THEREFORE, IN CONSIDERTAIION OF MUTUAL COVENANTS HEREIN THE PARTIES HERETO AGREE AS FOLLOWS:*

*1. That on application for grant of Loan of the Borrowers and on receipt of intimation from the Builder that the Property has been allotted to the Borrowers, PNBHFL has sanctioned the loan for purchase of Property of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_) Only) to the Borrowers according to its rules, but the actual payment in instalments will be made by PNBHFL directly to the Builder as per the norms of PNBHFL Any amount. towards purchase price in excess of the "Loan for purchase of Property" sanctioned .by PNBHFL will be paid by the Borrowers directly to the Builder as per sale agreement between the Builder and 'the Borrowers and original money receipts will be submitted to PNBHFL.*

*4. That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the Property to the Borrowers by the Builder. the Borrowers shall 'be liable to pay to PNBHFL regularly each month the Pre-*



*EMIs/EMIs as laid down in the Loan Agreement signed by and between PNBHFL and the Borrowers. The Borrowers shall execute an indemnity and such other documents as may be required by PNBHFL in favour of PNBHFL in this regard.*

### **Analysis and Findings**

- 17.** In the case of *Canara Bank vs. Shri. Vivek Kumar*, Company Appeal (Ins.) 390/2023, the Hon'ble Appellate Tribunal has determined that in case the Builder/Corporate Debtor expressly undertook the liability to refund the entire amount advanced by the Bank, it creates a direct financial obligation upon the Corporate Debtor to refund the amount back to the Bank. This Adjudicating Authority cannot return to the reasoning as was rejected by the Hon'ble NCLAT in its Order dated 09.01.2025. In view of the findings of the Hon'ble NCLAT, the Bank's claim as based upon the Clause 5 of the Tripartite Agreement qualifies as a Financial Debt as defined under Section 5(8) of the Code and must be admitted as such.
- 18.** The Hon'ble NCLAT in its order dated 09.01.2025 has given specific findings after detailed analysis that cannot be ignored. The operative portion states: *"We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis-a-vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal."*
- 19.** The Hon'ble NCLAT concluded that *"In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and IA No. 836/2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law."*
- 20.** Hon'ble NCLAT in order dated 9.1.2025 has taken the view that the Tripartite Agreement (TPA) in the present case is materially different from Value Infracon as it creates a direct liability on the Builder and has categorically recorded in Para 79 that *"...the Corporate Debtor/Builder has undertaken to refund the entire amount advanced by the Bank in case of event of default of repayment of the loan."*



- 21.** The undisputed fact is that the Applicant Bank directly disbursed loan amounts to the Corporate Debtor/Builder, albeit on behalf of and on the instructions of the homebuyer and money reached the Corporate Debtor from the Bank.
- 22.** In this case also the Clause 5 of Tripartite Agreement provides that upon borrower's default or any specified event due to which the loan is not utilised for purchase of the flat, the entire amount advanced by the Bank shall be refunded by the Builder to the Bank. The TPA does not merely indemnify the Bank, it creates a direct contractual obligation upon the Corporate Debtor to refund the entire amount advanced by the Bank in case of specified defaults and upon the occurrence of specified events.
- 23.** Further the Borrower authorized the Bank to disburse loan to the Builder and the Builder undertook to refund all amounts disbursed in case of specified defaults. With these provisions in TPA the Bank steps into the shoes of the homebuyer upon disbursing funds and occurrence of defaults acquires the right to enforce the refund from the Builder. The agreement creates a structure where the homebuyer's receivable from the Builder is, by contract, assigned to the Bank to the extent of loan disbursed.
- 24.** The Corporate Debtor received funds from the Bank to complete the real estate project. The homebuyers obtained financing from the Bank to enable them to purchase units. The Tripartite Agreement was structured such that Builder would receive the funds directly from the Bank and the Corporate Debtor undertook a contractual obligation to refund the entire amount to the Bank in case of default or failure to complete the project. This arrangement clearly has the commercial effect of a borrowing with the home buyers as intermediaries within the meaning of Section 5(8)(f) of the Code.
- 25.** Section 5(8) requires disbursement against consideration for time value of money. In this case loan amounts were directly disbursed by the Bank to the Corporate Debtor for construction and the refund obligation carries interest. This satisfies requirements of guarantee and Section 5(8)(f) requirements of commercial effect of borrowing therefore, a financial debt exists. Bank's claim is a valid "Financial Debt" under Section 5(8) and the Bank acquires the status of a "Financial Creditor".



- 26.** The Homebuyer may have approached the Bank seeking the loan but this not this negate the fact that TPA creates a direct and primary obligation upon the Corporate Debtor to refund the loan amount to the Bank in case of occurrence of specified events. The initial genesis of the transaction does not negate the contractual obligation that was ultimately created in favour of the Bank against the Corporate Debtor. The Corporate Debtor entered into the Tripartite Agreement voluntarily, agreed to receive money directly from the Bank, and it agreed to undertake the obligation to refund this money in specified circumstances. The Resolution Plan itself recognizes this by providing for treatment of bank as Financial Creditor. If the Bank had no claim at all, there would be no need for such a provision in the Resolution Plan.
- 27.** In cases were the homebuyers who have not filed any claims, if the Bank's claim is rejected, there will be no claim admitted in respect of these accounts despite the Corporate Debtor having received the money. This would lead to a situation where the Corporate Debtor which has failed to complete the project, would escape liability for substantial amounts it received, simply because the homebuyers have not filed claims.
- 28.** In view of Clause 5 of the Tripartite Agreement, it is evident that the Borrower/Homebuyer has authorized the Bank to disburse the above said loan amount directly to the Builder/Corporate Debtor; and such disbursement and the obligation to repay gave a right to the Bank to claim payment from the Corporate Debtor in terms of Section 3(6) and 5(8) of the Code.
- 29.** In light of the findings of Hon'ble NCLAT in CA 390 of 2023, the Ld. Bengaluru Bench in the case of Kotak Mahindra Bank v. Prasanna Kumar Rath & Ors., in IA-713/2024 vide Order dated 07.08.2025 came to the following findings: -
- “4. We have heard the Learned Counsel for the Applicant and RP and gone through the material available on record. Apparently, the RP not considered the claim made by the Applicant on the basis of the decision in Axis Bank Vs Value Infracon India Pvt Ltd Case.*
- 5. The Counsel during the course of hearing cited latest judgement of the Hon'ble NCLAT bearing Company Appeal (AT) (Ins.) No.390 of 2023 in the case*



of *Canara Bank vs. Shri.Vivek Kumar* and referred to Para-77 of the decision passed by the Hon'ble NCLAT. Para 77 to 80 of the judgment are extracted below:

*“ We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon'ble Supreme Court of India in the matter of Pioneer Urban Land (Supra) and this Appellate Tribunal in the case of Value Infracon India Private Limited (Supra). The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal Value Infracon India Private Limited (Supra) the Adjudicating Authority rejected the case of the Appellant.*

*78. We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the Comp. App. (AT) (Ins.) No. 390 of 2023 agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.*

*79. The Appellant Bank has directly disbursed the amount to the Corporate Debtor/Builder, albeit, on behalf of the Borrowers/Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.”*

*6. It is seen that in this case also there is a tripartite agreement between the Homebuyers, Corporate Debtor and PNB Housing Finance Limited which is placed at pages 329 to of the petition. Clause 7 of the Tripartite Agreement is reproduced below. As per Clause 7 of this Agreement and,*



*“7. That the Builder, in the event of default of repayment of loan by the Borrower shall on written intimation instructions of PNBHFL cancel the allotment of said property of the Borrower and refund the amount standing to the credit of borrowers in the books of developers account by PNBHFL directly to PNBHFL and the Builder shall have right to recover/forfeit the earnest money.” Further Clauses 7-14 lay down the undertaking given by the Builder.*

*7. Hence, the facts of this case are similar to the matter decided by the Hon’ble NCLAT in respect of the Tripartite Agreement and also considering the Clause 7 of the Agreement, It has to be held that the present Assignee namely the KOTAK MAHINDRA BANK has to be considered as a Finance Creditor in respect of the Amounts advanced by the then Assignor PNB Housing Finance Limited.*

*8. In view of the above Discussion, this present application is liable to be allowed. Accordingly, I.A No.713 of 2024 is allowed with the following direction.*

*The Respondent No. 1 is directed to admit the claim of the Applicant as Financial Creditor replacing the Respondent No. 2 to No. 5 to the extent of the claim of the Applicant in accordance with the right of subrogation pursuant to the terms of Tri-partite Agreement and consequently reconstitute the Committee of Creditors by including the Applicant along with entitled voting share to the Applicant in the Committee of Creditors.*

*In View of this direction, separate orders on other prayers at a, b and c separately are not considered necessary.”*

- 30.** Further, the Ld. Delhi Bench-II in the case of Indian Bank v. Ansal Properties & Infrastructure Ltd. in IA-6224/2024 vide Order dated 25.04.2025 placing reliance on Hon’ble NCLAT’s Canara Bank Order directed the Successful Resolution Applicant and Resolution Professional to file an affidavit that the Resolution Plan would be implemented in due deference to the Hon’ble NCLAT’s judgment.



**31.** After careful consideration of the entire matter, including the specific directions of the Hon'ble Supreme Court and the detailed analysis by the Hon'ble NCLAT, we arrive at the following conclusions:

- (a) The Tripartite Agreement creates a direct and primary contractual obligation upon the Corporate Debtor/Builder to refund the entire loan amount to the Applicant Bank in case of various specified events.
- (b) This clause is fundamentally different from the corresponding clause in the Value Infracon case, where there was no such obligation of repayment by the Builder to the Bank.
- (c) The disbursement by the Bank directly to the Corporate Debtor, coupled with the Corporate Debtor's undertaking to refund this amount, constitutes a transaction having the commercial effect of a borrowing within the meaning of Section 5(8)(f) of the IBC.
- (d) The fact that the initial loan agreement was between the Bank and the homebuyer does not negate the separate debt obligation created by TPA in favor of the Bank against the Corporate Debtor.
- (e) The Applicant Bank qualifies as a Financial Creditor of the Corporate Debtor under Section 5(7) read with Section 5(8) of the Insolvency and Bankruptcy Code, 2016.
- (f) The Resolution Plan itself recognizes banks deriving claims from Tripartite Agreements as financial creditors.
- (g) The delay in filing the claim cannot be a ground for rejection when the Resolution Plan itself provides for filing of claims within 45 days of its approval and the Plan has not yet been approved.

To again reject the Bank's claim after the Hon'ble NCLAT's detailed analysis finding error in the earlier rejection would not be in accordance with the appellate directions and would frustrate the judicial process.

### **Order**

- i. In view of the relevant clauses of the Tripartite Agreement, the findings of the Hon'ble NCLAT and the above mentioned Orders of the coordinate Benches i.e. Ld. Bengaluru Bench and Ld. New Delhi



Bench-2, this Adjudicating Authority holds the Applicant Bank to be a Financial Creditor of the Corporate Debtor.

- ii. It is ordered that the Applicant Bank, be recognized as a Financial Creditor of the Corporate Debtor for all those cases where claim has not been filed by the Homebuyer and based on the contractual obligation created under the Tripartite Agreement, the Resolution Professional is directed to admit the claim of the Applicant Bank. Consequently, the Applicant is entitled to be treated as a Financial Creditor for all purposes of CIRP, including participation in the Committee of Creditors and distribution under the Resolution Plan.
- iii. This order does not prejudice the rights of homebuyers who may file their own claims. If any homebuyer in respect of whose loan the Bank's claim is admitted subsequently files a claim within the timeline provided in the Resolution Plan, the Resolution Professional shall examine such claim independently. In case of any overlap or duplication between the Bank's claim and a homebuyer's claim in respect of the same unit, appropriate adjustments shall be made to avoid double counting, with priority given to the Homebuyers.
- iv. The present application stands allowed to the extent indicated above.

**-Sd/-**

**(DR. SANJEEV RANJAN)  
MEMBER (TECHNICAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH, COURT-III**

IA-836/2023  
In  
IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**..... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-836/2023:**

**CANARA BANK**

*Through its Authorized Representative Mr. Prince*

*Having its Head Office at:*

*112, J.C. Road, Bangalore-560002.*

*Having Branch Office at:*

*Delhi Tamil Sangam RK Puram, Sector-5, New Delhi.*

**..... APPLICANT BANK**

**VERSUS**

**MR. VIVEK KUMAR**

*(Resolution Professional of AVJ Developers (India) Pvt. Ltd.)*

*R/o C-604, Rosewood Apartments,*

*Mayur Vihar-I, Ext., New Delhi-110091.*

**.....RESPONDENT NO.1**

**MR. VINAY JAIN**

*(Successful Resolution Applicant of AVJ Developers (India) Pvt. Ltd.)*

*R/o D-230, Vivek Vihar, Delhi-110095.*

**..... RESPONDENT NO.2**

**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**



**PRESENT:**

For Applicant : Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha,  
Mr. Nikhil Mehndiratta, Mr. Agastya Sen,  
Ms. Nidhisha Choksi, Advs.

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. alongwith Mr. Vivek Kumar (RP)

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. The present Application has been filed by Canara Bank under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 and is seeking the following reliefs: -

*“a) Allow the present application, declare the Applicant Bank as a 'Secured Financial Creditor' in the present case and transactions pending subject matter of the present proceeding.*

*b) Direct the Non-Applicant i.e. Resolution Professional to admit the claim of the Applicant Bank towards as mentioned 32 accounts.*

*c) Direct the Non-Applicant i.e. Resolution Professional to consider the Applicant Bank as a Secured Financial Creditor and to give all rights and privileges to the Applicant Bank of Secured Financial Creditor and proportionate voting rights in the Committee of Creditors.*

*d) Pass any such further order/s as the Hon'ble Appellate Tribunal deems fit and proper in the interest of justice and equity.”*

2. The case of the Applicant Bank is that this Adjudicating Authority vide Order dated 21.10.2019 initiated Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s. AVJ Developers (India) Private Limited and the Respondent namely, Mr. Vivek Kumar was appointed as the Resolution Professional of the Corporate Debtor vide Order dated 04.10.2022 replacing Mr. Anil Tayal, the erstwhile Resolution Professional of the Corporate Debtor.



3. It is submitted that on 25.02.2021, the Applicant Bank filed its claim in Form C, as a Financial Creditor, in respect of the Corporate Debtor, with Mr. Anil Tayal, i.e. the Erstwhile Resolution Professional, in the present matter. The said claim was with respect to 59 accounts of individuals who have taken housing loans for the purchase of residential units/flats in the Corporate Debtor's project. The total claim filed by the Applicant Bank as on 21.10.2019 i.e. Insolvency Commencement Date was for Rs. 17,46,00,000/- (Rupees Seventeen Crores and Forty Six Lakhs Only).
4. It is submitted that, on 01.09.2022, the Applicant Bank received a communication from Mr. Anil Tayal, the Resolution Professional rejecting the claim of the Applicant Bank primarily on the premise that it is the individual homebuyers who can file claim with the Resolution Professional, and the claim filed by the Applicant Bank is without any locus as the claim has been filed directly by the Applicant Bank on behalf of the Home Buyers without any authorization being granted to the Applicant Bank by the Home Buyers.
5. It is submitted that the Resolution Professional rejected the claim without giving any opportunity to the Applicant Bank to clarify the position with respect to the said loan accounts having outstanding dues towards the Applicant Bank. Further, out of said 59 accounts towards which the claim was filed, no repayment has been made by the individual borrowers i.e. homebuyers. As on date, the accounts with respect to 32 homebuyers are still irregular as per the records maintained by the Applicant Bank.
6. It is submitted that the Applicant Bank has disbursed the loan amount directly to the Corporate Debtor (Builder), on behalf of the borrower/homebuyers as per the Tripartite Agreement executed between the Applicant Bank, the Borrower, and the Corporate Debtor in respect of all the accounts. It is further submitted that as per the terms of the Tripartite Agreement, there is prior charge/lien of the Applicant Bank on the residential units/flats in the Corporate Debtor's project towards which the housing loans were advanced. As per Clause 16 of the terms of said Tripartite Agreement, in the event of default, the entire amount advanced by the bank on account of the borrowers shall be refunded by the Corporate Debtor/Builder to the bank.



7. The Applicant Bank has also approached the Hon'ble DRT by way of filing Original Application ("OA") against the individual home buyers ("Borrowers") against the said accounts. The Ld. DRT, Delhi, while disposing the said OAs has directed that the primary liability to refund the outstanding dues of the Applicant Bank is that of the Corporate Debtor. Another OA preferred by the Applicant Bank, bearing no. 356/2019 was also disposed of in the same manner.
8. The Applicant Bank submits that out of 32 accounts of which the claim has been filed, the Applicant Bank holds decree in favour from the Ld. DRT against 18 accounts. As per Section 3(10) of the Insolvency and Bankruptcy Code, 2016, "**creditor**" means:  
*"Any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder"*
9. It is submitted that the Applicant Bank has right to maintain claim as Financial Creditor against the Corporate Debtor in the present facts and circumstances of the case. Accordingly, the rejection of the claim by the Ex-Resolution Professional is bad in law and is in total contrast and defiance to the judgments passed by the Ld. DRT, Delhi in favour of the Applicant Bank.
10. It is submitted that the reliance placed by the Resolution Professional on the judgment of **Axis Bank Limited Vs. Value Infracon India Private Limited & Anr** [Company Appeal (AT) (Insolvency) No 582 of 2020] passed by the Hon'ble National Company Law Appellate Tribunal, while rejecting the claim is not applicable in the present case in view of the orders passed by the Ld. DRT, Delhi whereby specific directions were issued in favour of bank to pursue its claim before the Liquidator or National Company Law Tribunal, as the case may be.
11. Thus, the Applicant Bank, in light of the above facts and circumstances, has prayed for appropriate directions to be passed against the Non-Applicant/Respondent herein to accept the claim filed by the Applicant as Financial Creditor against the Corporate Debtor.



## **Respondent/Resolution Professional's Case**

- 12.** The Respondent/Resolution Professional filed reply affidavit dated 28.04.2025 and submitted that the present Application is devoid of any substance and merit and is liable to be dismissed in limine.
- 13.** It is submitted that the Erstwhile Resolution Professional made a public announcement dated 22.10.2019 in Form-A as per the terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016 ("**CIRP Regulations**"). In terms of Regulation 6(2)(c) of the CIRP Regulations, the last date for submission of proof of claim was specified as 05.11.2019. Further, the said public announcement was duly uploaded on the website of the Insolvency and Bankruptcy Board of India ("IBBI"). The Applicant filed its claim on 24.02.2021, i.e. after more than 478 days from the last date of submission of claim i.e. 05.11.2019. Further, the resolution plan of the Corporate Debtor submitted by Mr. Vinay Jain with a voting share of 72.661% was approved by the CoC in its 14<sup>th</sup> Meeting conducted on 11.10.2021, e-voting concluded on 16.10.2021. Thereafter, on 09.11.2021, the Erstwhile Resolution Professional filed an application bearing I.A. No. 5385 of 2021 under Section 30(6) of the Code seeking approval of the Resolution Plan. In light of the judgment passed by Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another**, 2024 SCC OnLine SC 122, the Resolution plan was sent back to CoC for fresh consideration. The Resolution Plan was amended and again approved with voting share of 75.963% by the CoC in its 26<sup>th</sup> CoC meeting held on 26.06.2024, e-voting concluded on 04.07.2024. Thereafter, on 12.07.2024, the Resolution Professional filed an application bearing I.A.(Plan) No. 33 of 2024 seeking approval of the resolution plan which is pending before this Adjudicating Authority. Therefore, the claim filed by the Applicant Bank with a considerable delay cannot be admitted.
- 14.** It is submitted that as per Regulation 12 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), a creditor is required to file its claim on or before the last date mentioned in the public announcement. The proviso to Regulation 12(1) of CIRP Regulations provides as follows:



*“Provided that a creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit his claim with proof to the interim resolution professional or the resolution professional, as the case may be, up to the date of issue of request for resolution plans under regulation 36B or ninety days from the insolvency commencement date, whichever is later:  
Provided further that the creditor shall provide reasons for delay in submitting the claim beyond the period of ninety days from the insolvency commencement.”*

The above regulation came into effect on 18.09.2023, by way of an amendment to the CIRP regulations. However, prior to the amendment, a creditor was required to submit a claim on or before the ninetieth day of the insolvency commencement date. The last date for submission of Resolution Plan in the present case was 04.03.2020 and the Applicant had filed its claim on 24.02.2021. It is contended that the said amendment is prospective in nature and cannot be applied retrospectively. Thus, the CIRP Regulation, as it stood prior to the amendment, ought to be applied in the present case. Hence, it is evident that the Applicant failed to file its claim within the stipulated timeline.

**15.** The Respondent submitted that the Applicant Bank is neither a secured nor a financial creditor of the Corporate Debtor. A bare reading of the Tripartite Agreement, clearly indicate that the Applicant had granted loan to home buyers and not to the Corporate Debtor. Therefore, contrary to the contention of the Applicant, the Tripartite Agreement, in fact, reinforces the contention of the Answering Respondent i.e. the Applicant is not a secured financial creditor of the Corporate Debtor in as much as the Applicant did not grant any loan in favour of the Corporate Debtor.

**16.** It is contended by the Resolution Professional that the Applicant herein relied upon the Tripartite Agreements executed amongst the homebuyer, the Applicant and the Corporate Debtor for establishing its status as "secured creditor" of the Corporate Debtor. However, the Applicant has conveniently ignored the following Recital:



**Recital:**

"WHEREAS the Borrower has approached the Bank to grant him loan of Rs. 11,00,000/- (Rupees Eleven Lac only) for purchase of Schedule B property and the Bank has vide its sanction letter dated . . . Agreed to sanction the loan of Rs. 11,00,000/- (Rupees Eleven Lac Only) to the Borrower (hereinafter called "loan")

**Clause 2 of the Tripartite Agreement**, which state that the borrower authorised the Applicant to disburse the loan amount directly to the Corporate Debtor and the sum advanced by the Applicant to the borrower and remitted by the Applicant directly to the Corporate Debtor shall be deemed as disbursed by the Applicant to the borrower.

**Clause 3 of the Tripartite Agreement**, it says that the Bank has and shall have the first and paramount lien over the money disbursed by the Bank as loan to the Borrower, the charge in favour of the Bank shall be first and paramount over the charge which the Builder may have over the said flat/loan amount.

**Clause 20 of the Tripartite Agreement**, which state that the term of "loan" shall include interest, penal interest and all other sums payable by the borrower to the Applicant."

From the abovementioned recitals and covenants of the Tripartite Agreement, it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416**.

**17. Analysis and Findings**

- i) Heard the submissions of Ld. Counsel appearing for the Applicant and the Respondent and also perused the records.
- ii) In the instant case, the Applicant Bank has sought a direction to the Resolution Professional to admit the claim of the Applicant Bank with respect to 32 Homebuyers. It is seen from the records that out of these 32 home buyers, the 15 home buyers have filed their claims. The Resolution Professional, out of these 15 claims, admitted 13 claims and the remaining 2 claims are under verification. The remaining 17 home buyers have not filed any claims, so far.



- iii) Before proceeding to analysing the facts of the case and record the findings, it is essential to look at the background facts and some of the orders passed in this matter.
- iv) The instant application i.e. IA-836/2023, was filed by the Applicant/Bank seeking a direction to declare the Applicant/Bank as a Secured Financial Creditor and to direct the Respondent/Resolution Professional to admit the claim of the Applicant Bank etc.
- v) The said application was heard and was dismissed vide Order dated 10.02.2023 by the Hon'ble Principal Bench, NCLT, relying upon the Order dated 20.12.2021 passed in Company Appeal (AT) (Insolvency) No 582 of 2020 in the case of **"Axis Bank Limited Vs. Value Infracon India Private Limited & Anr."** by the Hon'ble NCLAT, New Delhi, wherein it was held that the Bank has not directly financed the Corporate Debtor and the real Financial Creditors are the homebuyers, the Hon'ble Principal Bench therefore, dismissed the application filed by the Canara Bank.
- vi) The operative part of the Order dated 10.02.2023 passed in IA-836/2023 by this Adjudicating Authority (Hon'ble Principal Bench) is extracted hereunder: -

*"This application has been filed by Canara Bank pleading that they have advanced various amount to individual home buyers and home buyers in tum have given the money in advance to the CD for the purpose of booking their units, the CD defaulted in the construction and the CD is now under CIRP proceedings. The Canara Bank/Applicant has filed a claim before the RP on the ground that they are the financial creditors as they have lent the money to the home buyers. This claim was rejected by the RP by proceedings dated 01.09.2022 (Annexure-3) (page-18) here under the RP relied upon the decision of the Hon'ble NCLAT, New Delhi the relevant portion of which is at page 19 which reads as under: -*

*Admittedly, in the present case the bank has not directly financed the Corporate Debtor.*

*The real financial creditors are the home buyers. The decision of the Hon'ble NCLAT applies to the facts of the present case hence the Resolution Professional was right in rejecting the claim.*



*We find no reason to interfere in the proceedings and the reasoning of the Resolution Professional, **IA-836/2023** stands dismissed.”*

vii) The Applicant Bank filed an Appeal before the Hon’ble NCLAT bearing Company Appeal No. 390/2023, against the order dated 10.02.2023 passed in IA-836/2023 by this Adjudicating Authority, which was dismissed vide Order dated 19.12.2023. The relevant part of the Order is reproduced hereunder: -

*“Although Counsel for the Appellant has vehemently argued that the impugned order is bad in law but he could not cite any judgment to the contrary to the decision rendered in the Case of Axis Bank (Supra), therefore, we do not find any merit in the present appeal and the same is hereby dismissed. No costs.”*

viii) The Order dated 19.12.2023 passed by the Hon’ble NCLAT in Company Appeal No. 390/2023 was challenged before the Hon’ble Supreme Court of India, in Civil Appeal No. 7311/2024 titled as **Canara Bank v. Vivek Kumar Resolution Professional of AVJ Developers (India) Private Limited**. The Hon’ble Supreme Court of India vide order dated 27.09.2024, set aside the order dated 19.12.2023 passed by the Hon’ble NCLAT in Company Appeal No. 390/2023 and remanded the matter back to the Hon’ble NCLAT for fresh consideration. The said order is extracted hereunder: -

*“With the consent of the parties, the appeal is taken up for final hearing.*

*Heard the learned counsel appearing for the parties.*

*One of the issues before the National Company Law Appellate Tribunal (for short, ‘NCLAT’) was whether as per the clauses of the relevant agreement, the developer was liable to repay the loan. Instead of considering the case of the appellant on facts, by a very cryptic order running into three paragraphs, the NCLAT has dismissed the appeal preferred by the appellant. Reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts.*

*As the NCLAT has not considered the merits of the appeal preferred by the appellant, we set aside the impugned order dated 19th December, 2023 and remand Company Appeal No. 390 of 2023 for a fresh consideration by the NCLAT.*



*We direct that the restored Company Appeal shall be listed before the NCLAT on 14th October, 2024 in the morning when the parties who are represented here shall be under an obligation to appear. On that day, the appellant may apply for appropriate interim relief.*

*To enable the appellant to apply for appropriate interim relief, we direct that till 16<sup>th</sup> October, 2024, the Resolution Plan shall not be approved.*

*We, however, make it clear that the application for interim relief which will be made by the appellant shall be decided by the NCLAT without being influenced by this limited relief granted by this Court.*

*All contentions of the parties are kept open.*

*The appeal is accordingly allowed.*

*The application for intervention is disposed of.*

*However, if the intervener make an application in the remanded Company Appeal for intervention, the same shall be considered by the NCLAT in accordance with law”.*

- ix) The Hon’ble Supreme Court of India has recorded that one of the issues for consideration before the Hon’ble NCLAT was “whether as per the Clauses of the relevant agreement, the developer was liable to repay the loan”. The Hon’ble Supreme Court, recorded that the reliance placed by the NCLAT on its own judgment appears to be not correct, as the said case was decided on its own facts. Accordingly, the Hon’ble Supreme Court remanded the case back to the Hon’ble NCLAT.
- x) The Hon’ble NCLAT vide order dated 09.01.2025, remanded the matter to this Adjudicating Authority for fresh consideration. The operative paragraphs of the order dated 09.01.2025 passed by the Hon’ble NCLAT are extracted below: -

*“We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon’ble Supreme Court of India in the matter of Pioneer Urban Land (Supra) and this Appellate Tribunal in the case of Value Infracon India Private Limited (Supra). The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal Value Infracon India*



*Private Limited (Supra) the Adjudicating Authority rejected the case of the Appellant.*

*We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.*

*The Appellant Bank has directly disbursed the amount to the Corporate Debtor/ Builder, albeit, on behalf of the Borrowers/ Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.*

*We observe that Clause 9.5(v) of the Resolution Plan provides for submission of claims by allottee/unit holder/flat/shop owner who had failed to file the same with the Respondent or who had filed it but the same was under verification, within 45 days of the approval of the Resolution Plan. Thus, even the plan is approved by CoC, the home-buyers/Financial Creditor are entitled to file their claims and there is no extinguishment of the claims during such protected period. We note that Intervener brought to our notice the clause in Resolution Plan: -*

*"In case any additional fund required for the completion of project or for the payment of any inability as per the resolution plan. the same shall be infused by the RA from his own source. "*

*In fact, the pleadings of the Intervenor and provision in the Resolution Plan support the cause of the Appellant and gives the Appellant due protection.*

*In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and IA No. 836/2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law. The Adjudicating Authority may decide without*



*being influenced by any of the observation made herein above. All contentions of the parties will also remain open*

*Parties are directed to appear before the Adjudicating Authority on 27.01.2025. No costs. IA. if any, are closed”.*

- xi) The Hon’ble NCLAT, thoroughly examined the relevant clauses of the Tripartite Agreement entered into amongst the Applicant Bank, the Homebuyers and the Corporate Debtor.
- xii) The Hon’ble NCLAT also took note of the relevant portions of the judgment in the case of **“Axis Bank Limited vs Value Infracon India Pvt Ltd. & Anr.”** which was relied upon by the Respondents therein and recorded that in the case of **Value Infracon India Pvt. Ltd. (Supra)**, the loans were given by the Banks to the independent homebuyers and it was the responsibility of the home buyers alone to repay the loan to the bankers/Financial Creditors and there was no responsibility of the Corporate Debtor/ Borrower for any payment to banker in case of any default by borrower or Corporate Debtor.
- xiii) Thus, the Hon’ble Appellate Tribunal referring to the Clauses in the Tripartite Agreement in the case of **Value Infracon India Pvt. Ltd. (Supra)** observed that the said clause clearly indicates that in case borrower/homebuyers failed to honour its commitment, the bank had THE right to pay the balance sale consideration and get it registered either in bank's name or its nominee's name.
- xiv) The Hon’ble NCLAT also referred to Clause 16 of the Tripartite Agreement in the present case and observed that this clause is quite different from the typical clauses of the Tripartite agreement and different from the equivalent clause of the **Value Infracon India Private Limited (Supra)**.
- xv) The Hon’ble NCLAT has also recorded that this Adjudicating Authority has not considered the distinction carved out in the relevant clauses of the Tripartite Agreement in the present case and therefore remanded the matter for fresh consideration/reassessment of the case.
- xvi) From the above discussion, it is imperative to examine the Clause 16 of the Tripartite Agreement in the present case and the relevant Clause of the Tripartite Agreement in case of **Value Infracon India Private Limited (Supra)** and to decide as to whether the Applicant/Bank can be considered to be a Financial Creditor in terms of Section 5(7) of the Code.



vii) The relevant Clause of the Tripartite Agreement in the case of Value Infracon India Pvt. Ltd. (Supra) has been taken note by the Hon'ble NCLAT in its judgment and is quoted hereunder: -

*"14. The relevant clause of the tri-partite Agreement entered into between the Home Buyers, the developer and the Appellant/M/s. Axis Bank is reproduced as hereunder: - "It is agreed by and between the parties to this Agreement that in case if the Borrower fails to honour the commitment. the Developer/Builder shall inform the BANK and the BANK shall have the right to pay the Sale consideration and get it registered either in BANK's name or its nominee. Likewise in the event the Borrower defaults in payment of instalments then, in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the Builder and shall accordingly have the right to write to the Builder cancellation of Agreement executed between the Builder and the Borrower, where after the Bank shall have the right to pay the Sale consideration and get the subject property registered either in the Bank's name or in the name of the Bank's nominee."*

xviii) The above clause indicates that in case the borrower/homebuyers fail to honour the commitment, the Bank shall have the right to pay the balance sale consideration and get it registered either in bank's name or its nominee's name.

xix) Clause 16 of the Tripartite Agreement of the present case is as under: -

*"16. In the event of default of repayment of the loan and/or the Borrower (s) committing any other default which make the Borrower liable for the re payment of the entire amount outstanding in the said loan as per the terms of the loan agreement executed between the Borrower's and the Bank, or (the Borrower withdraws from his agreement or Builder cancels the booking of the Borrower, or in the event of failure of the Builder to complete the project, or in the event of death of the Borrower. or in any event where the title to the schedule flat/dwelling unit is not/not being passed on to the Borrower or in any other eventualities of the nature by which the loan advanced by the Bank is not utilized for the purpose for which it was so advanced or breach of any of the terms and conditions contained in this*



*agreement, the entire amount advanced by the Bank on account of the Borrower shall be refunded by the Builder to the Bank. If the entire amount refunded by the Builder is insufficient to close the loan account, Borrower shall make immediate arrangements for payment of such deficit amount as may be required to close the loan account. If the Builder fails to repay the amount as stated under this clause, the Borrower shall repay the entire loan amount with interest, expenses, penal interest, etc. in terms of the loan agreement executed by the Borrowers”*

- xx) Perused the relevant clauses of the Tripartite Agreement in the case of “**Axis Bank Limited Vs. Value Infracon India Private Limited & Anr.**” as well as in the present case and noted the distinction in the present case. As per Clause 16 in the present case, the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default. The language used in this clause (Clause 16) is quite different from the clauses of the Tripartite Agreement in the case of **Value Infracon India Pvt. Ltd. (Supra)**. This clause (Clause 16) stipulated that in case of default of payment of loan or borrower committing any default or any event of failure of builder or in event where the title of dwelling unit is not passed on to the borrower/ homebuyers or due to breach of any terms and conditions contained in the Tripartite Agreement “the entire advance by the bank on account of borrower shall be refunded by the builder to the bank”. The Clause 16 also provides that in case the builder fails to pay the amount as stated in this clause, the borrower shall pay the entire loan amount with interest, including penal interest etc., in terms of loan agreement.
- xxi) It can be thus, seen that in case of the Tripartite Agreement of **Value Infracon India Pvt. Ltd. (Supra)**, there is no responsibility of the Corporate Debtor/ Builder/Developer, to repay any money of the bankers and the entire responsibility was that of the homebuyers, whereas in terms of clause 16 of the Tripartite Agreement of the present appeal, the primary responsibility of repayment of loan is that of the Builder/Corporate Debtor, in case of any of the eventuality laid down in Tripartite Agreement.
- xxii) The Applicant has therefore contended that Clause 16 of the Tripartite Agreement in the present case casts an obligation upon the Builder/ Corporate Debtor to repay the debt to the Bank. Thus, the entire amount



advanced by the Bank on the account of the borrower shall be refunded by the Builder/Corporate Debtor to the Applicant/Bank and therefore, the same would become a financial debt in terms of Section 5(8) read with Section 3(33) of the Code, the same may become a financial debt advanced by the Appellant bank to the Corporate Debtor.

xxiii) At this juncture, it is essential to note that an amendment was made in Section 5(8)(f) of the Code to enable the Homebuyers/allottees to act as Financial Creditor and to participate in the CoC. The Applicant Bank's case is that Clause 16 of the Tripartite Agreement in the present case agrees for payment in favour of the Applicant in terms of Section 3(6) of the Code and since, the Applicant gets a right to payment, it has to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor in terms of Clause 16 of the Tripartite Agreement.

xxiv) The amendment brought under Section 5(8)(f) of the Code which classified the homebuyers/allottees as Financial Creditors was challenged before the Hon'ble Supreme Court and the constitutional validity of Section 5(8)(f) of the Code was upheld by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.**, reported in (2019) 8 SCC.

xxv) At this stage, it is pertinent to peruse Clause 2 of the Tripartite Agreement. The Clause 2 is reproduced hereunder for ready reference.

*"The Borrower has already paid a sum of Rs.15,85,000/- (Rupees Fifteen Lac Eighty-Five Thousand Only) to the builder on..... as advance money for the purchase of Schedule B property. The Borrower hereby authorizes the Bank to disburse the above said loan amount directly to the Builder in terms of the above said Agreement for Sale or as requested by the Borrower. The sum of Rs.11,00,000/- (Rupees Eleven Lac Only) advanced by the Bank to the Borrower and remitted by the Bank directly to the builder shall be deemed as disbursed by the Bank directly to the Borrower."*

xxvi) The Recital to the Clause 2 of the Tripartite Agreement provides that it is the Borrower/Homebuyer and not the Builder/Corporate Debtor who has approached the Bank seeking loan for purchasing the flat. It is the Borrower/Homebuyer who has authorized the Bank to disburse the above said loan amount directly to the Builder/Corporate Debtor. This shows that



the Bank has acted on the instruction of the Homebuyer and not otherwise. Therefore, The submissions made on behalf of the Applicant Bank that the Applicant assumes the character of Financial Creditor defined under Section 5(7) of the Code just because the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default cannot be accepted.

xxvii) It will also be pertinent to refer to Section 5(8) of the Code at this stage, which defines the word “Financial Debt” as well as Clause (a) and (f) of Section 5(8) of the Code, which read as under: -

*“financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*

*(a) money borrowed against the payment of interest;*

*....*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation. - For the purposes of this sub-clause-*

*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

From the plain reading of the above definition of ‘Financial Debt’ under Section 5(8) of the Code, 2016, it is evident that the first and foremost ingredient/requirement for classifying a debt as a ‘financial debt’ is that the money must be disbursed against the consideration for the time value of money, involving borrowing with an obligation to pay interest. In the present case, the amount is raised by the Corporate Debtor from the Homebuyer and therefore, the real Financial Creditors in terms of Section 5(8)(f) of the Code are the Homebuyers as the loan was availed by the Homebuyers from the Bank which has not directly advanced the money to the Corporate Debtor and only acted on instructions of the Homebuyers in disbursing the loan amount to the Builder. The Clause 16 of the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, entitles the Bank to recover the same. In such a case, the said clause can only be termed as an indemnity clause under the Tripartite Agreement. The mere existence of a clause in the Tripartite Agreement stipulating that



the Builder would be liable to repay the loan to the Bank in event of default, does not alter the intrinsic nature of the transaction between the Bank and the Homebuyer. It is a settled principal of law that that terms of a contract/agreement cannot override or supersede statutory provisions. The provisions in a contract/agreement that conflicts with statutory mandate are generally considered invalid and unenforceable.

xxviii) In the instant case, the debt in question has been disbursed by the Bank to the Corporate Debtor on the instructions of the homebuyer so as to enable the homebuyer to purchase the flat. Such an arrangement made by the Bank and the Homebuyer will not change the character of the financial debt and place the bank in the category of a Financial Creditor, as can be seen in the clauses 2,3,16 and 20 in the Tripartite Agreement. These clauses in the Tripartite Agreement have been incorporated for the sake of convenience of the Bank. Under the Tripartite Agreement, it is the homebuyer who is availing the finance from the Bank and creating the charge in favour of the Bank by giving an undertaking to keep the bank indemnified against any loss. Therefore, the Bank cannot be termed as the Financial Creditor of the Corporate Debtor in terms of Section 5(7) of the Code. Thus, a clause in the Agreement cannot be contrary to the provisions of the Code or give a status to the party which is not contemplated by the Code. Accordingly, the claim of the Bank cannot be accepted as the Financial Creditor as no loan amount has been disbursed to the Corporate Debtor.

xxix) Upon perusal of the records, it is seen that the Applicant Bank has placed on record a copy of an E-mail dated 19.10.2024 sent by the Mr. Vinay Jain/Successful Resolution Applicant to Ld. Counsel appearing for Canara Bank after the matter was heard by the Hon'ble NCLAT, New Delhi on 16.10.2024 in the case of Canara Bank vs. Vivek Kumar, Resolution Professional of AVJ Developers (India) Pvt. Ltd. in Comp. App. (AT)(Ins) No. 390/2024. In the said E-mail, the Successful Resolution Applicant has categorically stated that out of the 32 claims filed by the Applicant Bank, 13 claims have been admitted by the Resolution Professional and further 19 claims are under consideration. The Successful Resolution Applicant made the following proposal to the Bank: -

*"1. The claim of homebuyers has been admitted as unsecured financial creditors, similarly, with respect to the 19 claims by the*



*Bank, the undersigned hereby proposes to accept these claims as unsecured financial creditors.*

*2. Pursuant to Clause 16 of the Tripartite Agreement, the undersigned proposes to accept the claim for the principal amount advanced by the Bank on behalf of the borrower to the Corporate Debtor (AVJ Developers (India) Pvt. Ltd.). The claim, however, shall exclude any interest, expenses, penal interest, or other ancillary charges.*

*3. The undersigned further proposes that the acceptance of the aforementioned claim shall be subject to the receipt of claims from the home allottees/borrowers of the said loan amount. In the event that, at any subsequent stage within 45 days from the date of approval of the resolution plan, as provided in the Resolution Plan, any home allottee/borrower files a claim in respect of any of the 19 units, the Bank's claim corresponding to such units shall stand extinguished.”*

xxx) The Successful Resolution Applicant vide E-mail dated 23.10.2024 shared a copy of the Amended Resolution Plan to the Applicant Bank. The Ld. Counsel on behalf of the Applicant Bank replied to E-mail dated 19.10.2024 rejected the proposal. In order to ascertain the treatment given to the Homebuyers who have either submitted belated claims or have not submitted any claims as well as that of the bank who is claiming to be given the status of the financial creditor in place of such Homebuyers, I have perused the Resolution Plan which is already on record and has been filed alongwith the IA (R.Plan)-33/(PB)/2024 filed by the Resolution Professional seeking approval of the Resolution Plan and pending before this Adjudicating Authority. Although a copy of the Resolution Plan has not been placed on record in the instant application, it was shared by the Successful Resolution Applicant with the Ld. Counsel for the Applicant-Bank vide E-mail dated 23.10.2024. In order to determine the issue involved, it is appropriate to refer to the relevant clauses of the Resolution Plan which is part of the IA (R. Plan)-33/(PB)/2024.

xxxi) **The relevant paragraph of the Resolution Plan is Para 9.7 of Chapter 9:-**



*“Settlement of Outstanding Liability of the Resolution Plan, deals with the claims of the Banks against Homeloans and Tripartite agreement with Homebuyers.”*

Sub-clause (a) of Paragraph 9.7 of the Resolution Plan reads as under:

*“(a) The separate details in this regard has not been given in the IM, but the claim lodged or to be lodged by the bank on the strength of Tripartite Agreement shall be treated as unsecured creditor and shall be settled by Resolution Applicant which will be paid in 2 quarterly equal instalments after 365 days from the date of approval of the Resolution Plan by the Hon'ble NCLT.”*

Sub-clause (b) of Paragraph 9.7 of the resolution plan reads as under:

*“(b) For the banks who have been subrogated in the position of flat owners by virtue of right exercised under Tripartite Agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be pay off as unsecured creditors as mentioned in Chapter-6.”*

- xxxii) A perusal of the sub clause (a) of Para 9.7 of the Resolution Plan shows that the claim, if any be lodged by the Bank on the strength of Tripartite Agreement shall be treated as unsecured creditor. The clause (b) of Para 9.7 of the Resolution Plan stipulates that banks who have been subrogated in the position of flat owners by virtue of right exercise under the tripartite agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be paid off as unsecured creditors as mentioned in Chapter VI of the Resolution Plan.
- xxxiii) At this stage, it may be clarified that no view or opinion is being expressed with respect to the Resolution Plan, even though certain paragraphs of the Resolution Plan have been referred to.
- xxxiv) In view of the foregoing discussion, the prayers of the Applicant-Bank in the present case cannot be allowed. Therefore, the present application is **dismissed**.

No order as to costs.

- Sd/-

**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH, COURT-III**

IA-836/2023  
In  
IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**..... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-836/2023:**

**CANARA BANK**

*Through its Authorized Representative Mr. Prince*

*Having its Head Office at:*

*112, J.C. Road, Bangalore-560002.*

*Having Branch Office at:*

*Delhi Tamil Sangam RK Puram, Sector-5, New Delhi.*

**..... APPLICANT BANK**

**VERSUS**

**MR. VIVEK KUMAR**

*(Resolution Professional of AVJ Developers (India) Pvt. Ltd.)*

*R/o C-604, Rosewood Apartments,*

*Mayur Vihar-I, Ext., New Delhi-110091.*

**.....RESPONDENT NO.1**

**MR. VINAY JAIN**

*(Successful Resolution Applicant of AVJ Developers (India) Pvt. Ltd.)*

*R/o D-230, Vivek Vihar, Delhi-110095.*

**..... RESPONDENT NO.2**

**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**



**PRESENT:**

For Applicant : Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha,  
Mr. Nikhil Mehndiratta, Mr. Agastya Sen,  
Ms. Nidhisha Choksi, Advs.

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. alongwith Mr. Vivek Kumar (RP)

**ORDER**

**PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)**

1. I have the advantage of going through the order authored by my Learned Brother Member (J). I have perused the comprehensive order and with utmost respect to the views expressed by my learned brother on the Bench, I find myself unable to concur with the opinion.
2. The present application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by the Applicant/Canara Bank.
3. It is the case of the Applicant that the Applicant Bank filed its claim on 25.02.2021 in Form C, as a Financial Creditor of the Corporate Debtor which was rejected by the Erstwhile Resolution Professional vide E-mail dated 01.09.2022, on the ground that it is the individual homebuyers who can file claim with the Resolution Professional, and the claim filed by the Applicant Bank is without any locus as the claim has been filed directly by the Applicant Bank on behalf of the Home Buyers without any authorization being granted to the Applicant Bank by the Home Buyers.
4. It is submitted that the Resolution Professional rejected the claim without giving any opportunity to the Applicant Bank to clarify the position with respect to the said loan accounts having outstanding dues towards the Applicant Bank.
5. It is submitted that the Applicant Bank has disbursed the loan amount directly to the Corporate Debtor (Builder), on behalf of the borrower/homebuyers as per the Tripartite Agreement executed between the Applicant Bank, the Borrower, and the Corporate Debtor in respect of all the accounts. It is further submitted that as per the terms of the Tripartite Agreement, there is prior charge/lien of the Applicant Bank on the residential units/flats in the Corporate Debtor's project towards which the housing loans were



advanced. As per Clause 16 of the terms of said Tripartite Agreement, in the event of default, the entire amount advanced by the bank on account of the borrowers shall be refunded by the Corporate Debtor/Builder to the bank.

6. The Hon'ble Principal Bench, Delhi vide Order dated 10.02.2023 initially dismissed Canara Bank's application seeking recognition as a secured financial creditor, relying on the Hon'ble NCLAT's earlier decision in the case of **Axis Bank v. Value Infracon**, Company Appeal (AT) (Insolvency) No 582 of 2020 which held that banks lending to individual homebuyers cannot claim directly against the corporate debtor. It was held that since the Bank had not financed the corporate debtor directly, the real financial creditors were the homebuyers. Aggrieved by the Order, the Applicant Bank filed an appeal before the Hon'ble NCLAT which was also dismissed vide Order dated 19.12.2023, leading to a further challenge before the Hon'ble Supreme Court.
7. The Supreme Court vide Order dated 27.09.2024 passed in Civil Appeal No. 7311/2024 titled as **Canara Bank v. Vivek Kumar Resolution Professional of AVJ Developers (India) Private Limited** set aside the order dated 19.12.2023 passed by the Hon'ble NCLAT in Company Appeal No. 390/2023 and remanded the matter back to the Hon'ble NCLAT for fresh consideration on merits observing that the Appellate Tribunal failed to examine whether the Developer was contractually liable to refund the loan under the Tripartite Agreements.
8. The Hon'ble NCLAT vide Order dated 09.01.2025 passed in Company Appeal No. 390/2023, upon fresh examination on merits, found that the Tripartite Agreements in the present case were materially different from those in Value Infracon, because the builder had expressly undertaken to refund the entire loan amount to the Bank in case of default. Consequently, the Hon'ble NCLAT held that this Adjudicating Authority had erred in not considering these contractual distinctions and remanded the matter back to this Adjudicating Authority for fresh adjudication.
9. The findings of Hon'ble NCLAT's Order made in Para 70 to 80 of the detailed judgment passed in Company Appeal No. 390/2023 dated 09.01.2025, are reproduced hereunder for ready reference: -

*"70. In Clause 16 of the tripartite agreement in the present appeal and it is only on the failure of the builder to repay to the*



*Appellant Bank, the borrower/homebuyer is required to repay the entire outstanding balances to the Appellant/Bank. We note that this is quite distinctive term which has been signed by the Appellant Bank as lender, the borrower (homebuyers) and the builder (Corporate Debtor) making direct relationship and set of obligations and rights between the Appellant/Bank and the Corporate Debtor/Builder. In fact, the primary responsibility in the present case is of the Corporate Debtor/Builder and secondary responsibility is of borrower/Homebuyers.*

*71. We have already taken into consideration the definition of financial debt in our earlier discussion. The main requirement is that there must be debt along with interest, if any, which is disbursed against time value and money and there should be disbursement of money from creditors to debtors in terms of Section 5(8) of the Code. In context of Section 5(8) of the Code, promise by the debtor to pay money to the creditor may also tantamount to transaction as defined under Section 3(33) of the Code and same may attract the provisions of the Section 5(8) of the Code. We have already noted that the Clause 16 of the tripartite agreement in the present appeal amongst the parties indicates that the entire amount advanced by the bank on account of the borrower shall be refunded by the Corporate Debtor/Builder to the Appellant/bank thus in terms of Section 5(8) r/w Section 3(33) of the Code, the same may become a financial debt advanced by the Appellant bank to the Corporate Debtor.*

*72. We would like to reiterate and re-emphasised that in normal case it is only the homebuyers/allottee who could be treated as Financial Creditor and not lenders/banker who lent the money to the allottee. The very fact that the amendment was made in Section 5(8)(f) of the Code was to enable the homebuyers/allottees to act as Financial Creditor and participate in CoC. However, since the peculiar clause has been provided in the present agreement which create the rights of the Appellant banker for the right to payment in terms of Clause 3(6) of the*



*Code and based on this right to payment the appellant has pleaded to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor which was specifically agreed in Clause 16 of the agreement.*

*73. Another pleas taken by the Respondent is regarding non registering of the charge created in favour of the Appellant as well as claims under recovery certificate issue by the DRT amounting to financial debt.*

*74. As regard the issue of non registration of mortgage as per Section 77 of the Companies Act, 2013 the issue was dealt by this Appellate Tribunal in the matter of Canara Bank (Supra). The relevant portion of this judgment reads as under: -*

*“52. Be that as it may, on a careful consideration of respective contentions, this Tribunal, keeping in mind of the prime fact that ‘Right to recover’ the money, lent by enforcing a mortgage is a ‘Right to enforce’, an interest in the property and that the claim of the ‘First Charge Holder’, shall prevail over the claim of the ‘Second Charge Holder’, and the ‘Appellant / Petitioner’, can very well enforce the ‘Security Interest’, resting on Section 58(f) of the ‘Transfer of Property Act’, 1882 and ‘Rule 8 of the Security Interest (Enforcement) Rules, 2002’, comes to a resultant conclusion that ‘mortgage’, is the result of the ‘Act of Parties’, where the ‘Transfer of Ownership Interest’, in a particular ‘Immoveable Asset’ is created, and that the conclusion arrived at by the ‘Adjudicating Authority / Tribunal’, in upholding the decision of the ‘Liquidator’, in classifying the ‘Appellant / Petitioner / Bank’, as an ‘Unsecured Financial Creditor’, is an illegal and an invalid one, in the eye of ‘Law’ and in the ‘Liquidation Proceedings’, the Appellant / Bank, is to be treated as ‘Secured Creditor’, as held by this ‘Tribunal’.*

*53. In addition, the ‘non-registration of the Mortgage’, as per Section 77 of the Companies Act, 2013, is not a sufficient / enough ground, to come to an ‘opinion’, that the ‘Appellant’, is not a ‘Secured Creditor’. In reality, the ‘rights’ of a ‘Mortgagee’,*



under the 'Transfer of Property Act', 1882 and the 'SARFAESI Act', are not to be diluted, in terms of Regulation 21 of IBBI (Liquidation process) Regulations, 2016."

*(Emphasis Supplied)*

**75.** *The above judgment make the position clarified that such non registration will not has any adverse impact on the right of the Appellant.*

**76.** *As regard claim under recovery certificate issued by the DRT, we will again refer to Clause 5(8) of the Code, where the word "include" has been used which enlarge the scope of the definition of Section 5(8) of the Code. We observe that subsequent to the word 'includes' 9 sub-clauses from (a) to (i) have been mentioned. This list is not exhaustive and only illustrative. Thus, the recovery certificate issued by the DRT may fall within the definition of financial debt.*

**77.** *We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon'ble Supreme Court of India in the matter of **Pioneer Urban Land (Supra)** and this Appellate Tribunal in the case of **Value Infracon India Private Limited (Supra)**. The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal **Value Infracon India Private Limited (Supra)** the Adjudicating Authority rejected the case of the Appellant.*

**78.** *We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis **Value Infracon India Private Limited (Supra)**, as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.*

**79.** *The Appellant Bank has directly disbursed the amount to the Corporate Debtor/ Builder, albeit, on behalf of the Borrowers/*



*Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.*

**80.** *We observe that Clause 9.5(v) of the Resolution Plan provides for submission of claims by allottee/ unit holder/ flat/ shop owner who had failed to file the same with the Respondent or who had filed it but the same was under verification, within 45 days of the approval of the Resolution Plan. Thus, even the plan is approved by CoC, the home-buyers/ Financial Creditor are entitled to file their claims and there is no extinguishment of the claims during such protected period.”*

10. The Hon'ble NCLAT in its Order dated 09.01.2025 had held that the Tripartite Agreement in the present case is fundamentally different from the Tripartite Agreement in the case of **Axis Bank v. Value Infracon (Supra)** and in the present case, the Builder/Corporate Debtor expressly undertook the liability to refund the entire amount advanced by the Bank in the following events as contained in Clause 16 of the Tripartite Agreement between the Homebuyers, Bank and the Corporate Debtor. Clause 16 of the Tripartite Agreement is reproduced herein below: -

*“16. In the event of default of repayment of the loan and/or the Borrower (s) committing any other default which make the Borrower liable for the re payment of the entire amount outstanding in the said loan as per the terms of the loan agreement executed between the Borrower's and the Bank, or (the Borrower withdraws from his agreement or Builder cancels the booking of the Borrower, or in the event of failure of the Builder to complete the project, or in the event of death of the Borrower. or in any event where the title to the schedule flat/ dwelling unit is not/ not being passed on to the Borrower or in any other eventualities of the nature by which the loan advanced by the Bank is not utilized for the purpose for which it was so advanced or breach of any of the terms and conditions contained in this agreement, the entire amount advanced by the Bank on account of the Borrower shall be refunded by the Builder*



*to the Bank. If the entire amount refunded by the Builder is insufficient to close the loan account, Borrower shall make immediate arrangements for payment of such deficit amount as may be required to close the loan account. If the Builder fails to repay the amount as stated under this clause, the Borrower shall repay the entire loan amount with interest, expenses, penal interest, etc. in terms of the loan agreement executed by the Borrowers”*

11. Upon a perusal of the Clause 16 of the Tripartite Agreement, it is evident that the Bank had disbursed the funds directly to the Corporate Debtor, though on behalf of borrowers; and such disbursement gave a right to the Bank to claim payment from the Corporate Debtor in terms of Section 3(6) and 5(8) of the Code.
12. The Hon’ble NCLAT in its order dated 09.01.2025 has given specific findings after detailed analysis that cannot be ignored. The operative portion states: *“We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis-a-vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.”*
13. The Hon’ble NCLAT concluded that *“In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and IA No. 836/2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law.”*
14. While the Hon’ble NCLAT stated that we *“may decide without being influenced by any of the observation made herein above,”* it is evident that the Hon’ble NCLAT has already conducted a detailed analysis and found merit in the Bank’s case. The remand was not to enable us to reach the same conclusion as before, but to properly consider the distinctions that were earlier ignored. To again reject the Bank’s claim after the Hon’ble NCLAT has specifically found that the earlier rejection was erroneous would amount to not giving effect to the appellate order and frustrating the directions of the superior court.



15. Hon'ble NCLAT in order dated 9.1.2025 has taken the view that the Tripartite Agreement (TPA) in the present case is materially different from Value Infracon as it creates a direct liability on the Builder and has categorically recorded in Para 79 that "*...the Corporate Debtor/Builder has undertaken to refund the entire amount advanced by the Bank in case of event of default of repayment of the loan.*"
16. The undisputed fact is that the Applicant Bank directly disbursed loan amounts to the Corporate Debtor/Builder, albeit on behalf of and on the instructions of the homebuyer and money reached the Corporate Debtor from the Bank. The Hon'ble NCLAT specifically recognized this fact in its order dated 09.01.2025.
17. The TPA does not merely indemnify the Bank, it creates a direct contractual obligation upon the Corporate Debtor to refund the entire amount advanced by the Bank in case of specified defaults and upon the occurrence of specified events.
18. Further the Borrower authorized the Bank to disburse loan to the Builder and the Builder undertook to refund all amounts disbursed in case of specified defaults. With these provisions in TPA the Bank steps into the shoes of the homebuyer upon disbursing funds and occurrence of defaults acquires the right to enforce the refund from the Builder. The agreement creates a structure where the homebuyer's receivable from the Builder is, by contract, assigned to the Bank to the extent of loan disbursed.
19. The Corporate Debtor received funds from the Bank to complete the real estate project. The homebuyers obtained financing from the Bank to enable them to purchase units. The Tripartite Agreement was structured such that Builder would receive the funds directly from the Bank and the Corporate Debtor undertook a contractual obligation to refund the entire amount to the Bank in case of default or failure to complete the project. This arrangement clearly has the commercial effect of a borrowing with the home buyers as intermediaries within the meaning of Section 5(8)(f) of the Code.
20. Section 5(8) requires disbursement against consideration for time value of money. In this case loan amounts were directly disbursed by the Bank to the Corporate Debtor for construction and the refund obligation carries interest. This satisfies requirements of Section 5(8)(i) of guarantee and Section 5(8)(f) requirements of commercial effect of borrowing therefore, a financial



debt exists. Bank's claim is a valid "Financial Debt" under Section 5(8) and the Bank acquires the status of a "Financial Creditor".

21. The Homebuyer may have approached the Bank seeking the loan but this not this negate the fact that TPA creates a direct and primary obligation upon the Corporate Debtor to refund the loan amount to the Bank in case of occurrence of specified events. The initial genesis of the transaction does not negate the contractual obligation that was ultimately created in favour of the Bank against the Corporate Debtor. The Corporate Debtor entered into the Tripartite Agreement voluntarily, agreed to receive money directly from the Bank, and it agreed to undertake the obligation to refund this money in specified circumstances. The Resolution Plan itself recognizes this by providing for treatment of bank as Financial Creditor. If the Bank had no claim at all, there would be no need for such a provision in the Resolution Plan.
22. In cases were the homebuyers who have not filed any claims, if the Bank's claim is rejected, there will be no claim admitted in respect of these accounts despite the Corporate Debtor having received the money. This would lead to a situation where the Corporate Debtor which has failed to complete the project, would escape liability for substantial amounts it received, simply because the homebuyers have not filed claims.
23. Once the Appellate Tribunal has determined that in case the Builder/Corporate Debtor expressly undertook the liability to refund the entire amount advanced by the Bank, it creates a direct financial obligation upon the Corporate Debtor to refund the amount back to the Bank, this Adjudicating Authority cannot return to the reasoning that rejected by the Hon'ble NCLAT in its Order dated 09.01.2025. In view of the findings of the Hon'ble NCLAT, the Bank's claim based upon the Clause 16 of the Tripartite Agreement qualifies as a Financial Debt as defined under Section 5(8) of the Code and must be admitted as such.
24. In light of the above findings of Hon'ble NCLAT, the Ld. Bengaluru Bench in the case of Kotak Mahindra Bank v. Prasanna Kumar Rath & Ors., in IA-713/2024 vide Order dated 07.08.2025 came to the following findings: -  
*"4. We have heard the Learned Counsel for the Applicant and RP and gone through the material available on record. Apparently, the RP not considered the claim made by the Applicant on the basis of the decision in Axis Bank Vs*



*Value Infracon India Pvt Ltd Case.*

5. *The Counsel during the course of hearing cited latest judgement of the Hon'ble NCLAT bearing Company Appeal (AT) (Ins.) No.390 of 2023 in the case of Canara Bank vs. Shri.Vivek Kumar and referred to Para-77 of the decision passed by the Hon'ble NCLAT. Para 77 to 80 of the judgment are extracted below:*

*“ We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon'ble Supreme Court of India in the matter of Pioneer Urban Land (Supra) and this Appellate Tribunal in the case of Value Infracon India Private Limited (Supra). The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal Value Infracon India Private Limited (Supra) the Adjudicating Authority rejected the case of the Appellant.*

*78. We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the Comp. App. (AT) (Ins.) No. 390 of 2023 agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.*

*79. The Appellant Bank has directly disbursed the amount to the Corporate Debtor/Builder, albeit, on behalf of the Borrowers/Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire amount advanced by the bank in case of event of default of repayment of loan.”*

6. *It is seen that in this case also there is a tripartite agreement between the Homebuyers, Corporate Debtor and PNB Housing Finance Limited which is placed at pages 329 to of the petition.*



Clause 7 of the Tripartite Agreement is reproduced below. As per Clause 7 of this Agreement and,

*“7. That the Builder, in the event of default of repayment of loan by the Borrower shall on written intimation instructions of PNBHFL cancel the allotment of said property of the Borrower and refund the amount standing to the credit of borrowers in the books of developers account by PNBHFL directly to PNBHFL and the Builder shall have right to recover/forfeit the earnest money.”* Further Clauses 7-14 lay down the undertaking given by the Builder.

*7. Hence, the facts of this case are similar to the matter decided by the Hon’ble NCLAT in respect of the Tripartite Agreement and also considering the Clause 7 of the Agreement, It has to be held that the present Assignee namely the KOTAK MAHINDRA BANK has to be considered as a Finance Creditor in respect of the Amounts advanced by the then Assignor PNB Housing Finance Limited.*

*8. In view of the above Discussion, this present application is liable to be allowed. Accordingly, I.A No.713 of 2024 is allowed with the following direction.*

*The Respondent No. 1 is directed to admit the claim of the Applicant as Financial Creditor replacing the Respondent No. 2 to No. 5 to the extent of the claim of the Applicant in accordance with the right of subrogation pursuant to the terms of Tri-partite Agreement and consequently reconstitute the Committee of Creditors by including the Applicant along with entitled voting share to the Applicant in the Committee of Creditors.*

*In View of this direction, separate orders on other prayers at a, b and c separately are not considered necessary.”*

25. Further, the Ld. Delhi Bench-II in the case of Indian Bank v. Ansal Properties & Infrastructure Ltd. in IA-6224/2024 vide Order dated 25.04.2025 placing reliance on Hon’ble NCLAT’s Canara Bank Order directed the Successful Resolution Applicant and Resolution Professional to file an affidavit that the Resolution Plan would be implemented in due deference to the Hon’ble NCLAT’s judgment.



## **Conclusion**

26. After careful consideration of the entire matter, including the specific directions of the Hon'ble Supreme Court and the detailed analysis by the Hon'ble NCLAT, we arrive at the following conclusions:

- (a) The Tripartite Agreement creates a direct and primary contractual obligation upon the Corporate Debtor/Builder to refund the entire loan amount to the Applicant Bank in case of various specified events.
- (b) This clause is fundamentally different from the corresponding clause in the Value Infracon case, where there was no such obligation of repayment by the Builder to the Bank.
- (c) The disbursement by the Bank directly to the Corporate Debtor, coupled with the Corporate Debtor's undertaking to refund this amount, constitutes a transaction having the commercial effect of a borrowing within the meaning of Section 5(8)(f) of the IBC.
- (d) The fact that the initial loan agreement was between the Bank and the homebuyer does not negate the separate debt obligation created by TPA in favor of the Bank against the Corporate Debtor.
- (e) The Applicant Bank qualifies as a Financial Creditor of the Corporate Debtor under Section 5(7) read with Section 5(8) of the Insolvency and Bankruptcy Code, 2016.
- (f) The Resolution Plan itself recognizes banks deriving claims from Tripartite Agreements as financial creditors.
- (g) The delay in filing the claim cannot be a ground for rejection when the Resolution Plan itself provides for filing of claims within 45 days of its approval and the Plan has not yet been approved.

To again reject the Bank's claim after the Hon'ble NCLAT's detailed analysis finding error in the earlier rejection would not be in accordance with the appellate directions and would frustrate the judicial process.

## **Order**

- i. In view of the relevant clauses of the Tripartite Agreement, the findings of the Hon'ble NCLAT and the above mentioned Orders of the coordinate Benches i.e. Ld. Bengaluru Bench and Ld. New Delhi Bench-II, this Adjudicating Authority holds the Applicant Bank to be a Financial Creditor of the Corporate Debtor.



- ii. It is ordered that the Applicant Bank, be recognized as a Financial Creditor of the Corporate Debtor for all those cases where claim has not been filed by the Homebuyer and based on the contractual obligation created under the Tripartite Agreement, the Resolution Professional is directed to admit the claim of the Applicant Bank. Consequently, the Applicant is entitled to be treated as a Financial Creditor for all purposes of CIRP, including participation in the Committee of Creditors and distribution under the Resolution Plan.
- iii. This order does not prejudice the rights of homebuyers who may file their own claims. If any homebuyer in respect of whose loan the Bank's claim is admitted subsequently files a claim within the timeline provided in the Resolution Plan, the Resolution Professional shall examine such claim independently. In case of any overlap or duplication between the Bank's claim and a homebuyer's claim in respect of the same unit, appropriate adjustments shall be made to avoid double counting, with priority given to the Homebuyers.
- iv. The present application stands allowed to the extent indicated above.

**-Sd/-**

**(DR. SANJEEV RANJAN)  
MEMBER (TECHNICAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH, COURT-III**

IA-1006/2024

In

IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**.... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**.... CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-1006/2024:**

**BANK OF BARODA**

*Through its Authorized Representative Mr. Anirudh Sharma.*

*Having its Head Office at:*

*7th Floor, Baroda Bhavan, R. C. Dutt Road, Vadodara- 390007.*

*Having Branch Office at:*

*ROSARB, 4th Floor, Rajender Bhawan, Rajender Place, New Delhi-110008.*

**..... APPLICANT BANK**

**VERSUS**

**MR. VIVEK KUMAR**

**(Resolution Professional of AVJ Developers (India) Pvt. Ltd.**

R/o C-604, Rosewood Apartments,

Mayur Vihar-I, Ext., New Delhi-110091.

**.....RESPONDENT**

**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For Applicant : Mr. Sougat Sinha, Adv.

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. Mr. Vivek Kumar (RP)

**ORDER**



**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. The present Application has been filed by Bank of Baroda under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 and is seeking the following reliefs: -
  - “i) Allow the present application and Direct the Respondent to accept the claims of the Applicant; or*
  - ii) To secure the assets charged to the Bank; or*
  - iii) Pass such other directions/orders as this Hon'ble Tribunal may deem fit in the interest of justice.”*
2. The case of the Applicant Bank is that this Adjudicating Authority vide Order dated 21.10.2019 initiated Corporate Insolvency Resolution Process against the Corporate Debtor i.e. M/s. AVJ Developers (India) Private Limited and the Respondent namely Mr. Vivek Kumar was appointed the Resolution Professional of the Corporate Debtor vide Order dated 04.10.2022 replacing Mr. Anil Tayal, the erstwhile Resolution Professional of the Corporate Debtor.
3. It is submitted that on 29.12.2022, the Applicant Bank vide six separate claim forms filed its claim as a Financial Creditor for an amount of Rs. 3,07,71,916.55/- (Rupees Three Crore Seven Lacs One Thousand Nine Hundred Sixteen and Fifty Five Paise), with respect to the amounts disbursed for allotment of units to homebuyers in the Project. The claims relate to the flats bearing flat nos. D-1007, K-1805, K-1807, B- 1701, A-1907, A-2104.
4. It is submitted that the Respondent/Resolution Professional vide email dated 28.04.2023 rejected the claim of Applicant on two grounds as mentioned below:
  - (i) That the last date of submission of claim expired on 07.10.2021, and
  - (ii) That, an Application bearing No. IA 5385/2021 has been filed under section 30(6) of the IBC, 2016 before the Hon'ble NCLT for approval of the Resolution Plan.



5. It is submitted that the Applicant had sanctioned a Housing loan facility to the allottees of Corporate Debtor for purchase of flats in AVJ Heights situated at Plot No. GH-12/2, Sector Zeta -1, Greater Noida UP 201201. The details of units and names of Allottees are mentioned below:

<b>S. No.</b>	<b>Name of Allottee/ Account No. /Suit Details</b>	<b>Unit No. in Plot No. GH-12/2, Sector Zeta- 1, Greater Noida, UP-201301</b>	<b>Amount o/s as on 24.12.2022 (In Rs.)</b>
1.	Mr. Rajat Arora/ 60220015181219/ OA no. 95/2018 DRT – I, Delhi.	D-1007, 10 <sup>th</sup> Floor, Tower D, AVJ Heights	71,82,668.79/-
2.	Sudhir Sethi/ 07920600000993/ OA No. 952/2019 DRT-II, Delhi.	K-1805, 18 <sup>th</sup> Floor, Tower-K, AVJ Heights	45,77,008.96/-
3.	Sharan Gopal/ 12870600001172/ OA No.195/2018 DRT-I, Delhi.	K- 1807, 18 <sup>th</sup> Floor, Tower-K, AVJ Heights	69,17,781.69/-
4.	Satyanand Singh/ 51780600000462/ OA No. 186/2018DRT- I, Delhi.	B- 1701, 17 <sup>th</sup> Floor, Tower-B, AVJ Heights	56,05,594.08/-
5.	Rahul Tyagi/ 51770600000460/ OA No. 897/2017 DRT-I, Delhi.	A-1907, 19 <sup>th</sup> Floor, Tower-A, AVJ Heights	63,92,048.35/-
6.	Himanshu Prabhakar/ 010706000003397/ OA No. 18/2018 DRT-III, Delhi.	A- 2104, 21 <sup>st</sup> Floor, Tower-A, AVJ Heights	57,02,408.76/-

6. It is submitted that the flats which were funded by the Applicant and were under construction and therefore the registration of said flats could not have been made in favour of the Allottees/Borrowers. Consequently, the security in favour of the Applicant Bank by way of deposit of title deeds could not have been complied with by the Allottees as the Corporate Debtor has delayed the construction and granting of the occupancy certificate in respect of the said flats. Therefore, in order to ensure security, Tripartite Agreements with common contents were executed between the Allottees/Borrowers, the Applicant and the Corporate Debtor. It is submitted that the Applicant is entitled to step into the shoes of the homebuyer/borrower in case the Corporate Debtor fails to execute the sale deed or handover possession of the property to the Homebuyer/Borrower.



7. It is submitted that the Obligations of the Corporate Debtor have been enumerated in Clause 3(c) of the Tripartite Agreement executed between the Homebuyers, the Applicant Bank and the Corporate Debtor. The terms of the said Tripartite Agreements are binding on the Corporate Debtor, the Resolution Professional as well as the Successful Resolution Applicant who are not entitled to either amend, modify or exhaust the rights of the Applicant as agreed therein.
8. It is submitted that the Corporate Debtor agreed that in case of any delay on the part of the Corporate Debtor or if the Corporate Debtor fails or refuses to execute sale deed in favour of the Borrower and hand over the possession of property even after the date of final disbursement of loan within a period not exceeding 365 days; the Applicant shall have all the rights to take all requisite steps for getting the sale deed executed in its favour and/or take possession of the Property. Further, it was prescribed that if the builder fails to execute the sale deed with the Borrower or in the event of any litigation affecting the said property, the Builder shall immediately refund all the monies disbursed by the Bank together with interest at the rate accrued on such loans including penal interest applicable. As per the Tripartite Agreement, if the borrowers fail to pay his stipulated margin amount the entire amount advanced by the Bank will be refunded by the Builder to the Bank, together with interest due including penal interest if any. The Builder also undertakes to obtain completion certificate and certificate issued by the competent Authority in respect of the property and also undertakes he shall not handover the possession/Conveyance Deed of the property to the Borrowers without the consent of the Bank.
9. It is submitted that since the Corporate Debtor failed to complete the construction of the project and consequently the Borrowers have stopped payment of EMIs, the above-mentioned accounts of the Borrowers have turned NPA. The Applicant had filed the Original Applications (“**OA**”) against the Corporate Debtor in respect of the abovementioned four Borrowers wherein the Ld. DRT was pleased to issue Notice in the respective OAs and stay any transfer, creation of third-party rights in respect of the allotted flats.



### **Respondent/Resolution Professional's Case**

- 10.** The Respondent/Resolution Professional filed reply affidavit dated 27.02.2025 and submitted that the present Application is devoid of any substance and merit and is liable to be dismissed *in limine*.
- 11.** It is submitted that the Erstwhile Resolution Professional made a public announcement dated 22.10.2019 in Form-A as per the terms of Regulation 6(1) of the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016 ("**CIRP Regulations**"). In terms of Regulation 6(2)(c) of the CIRP Regulations, the last date for submission of proof of claim was specified as 05.11.2019. Further, the said public announcement was duly uploaded on the website of the Insolvency and Bankruptcy Board of India ("IBBI"). The Applicant filed its claim on 29.12.2022, i.e. after more than 3 years from the last date of submission of claim i.e. 05.11.2019. Further, the resolution plan of the Corporate Debtor submitted by Mr. Vinay Jain with a voting share of 72.661% was approved by the CoC in its 14<sup>th</sup> Meeting conducted on 11.10.2021, e-voting concluded on 16.10.2021. Thereafter, on 09.11.2021, the Erstwhile Resolution Professional filed an application bearing I.A. No. 5385 of 2021 under Section 30(6) of the Code seeking approval of the Resolution Plan. In light of the judgment passed by Hon'ble Supreme Court in **Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni and Another**, 2024 SCC OnLine SC 122, the Resolution plan was sent back to CoC for fresh consideration. The Resolution Plan was amended and again approved with voting share of 75.963% by the CoC in its 26<sup>th</sup> CoC meeting held on 26.06.2024, e-voting concluded on 04.07.2024. Thereafter, on 12.07.2024, the Resolution Professional filed an application bearing I.A.(Plan) No. 33 of 2024 seeking approval of the resolution plan which is pending before this Adjudicating Authority. Therefore, the claim filed by the Applicant Bank with a considerable delay cannot be admitted.
- 12.** It is submitted that as per Regulation 12 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), a creditor is required to file its claim



on or before the last date mentioned in the public announcement. The proviso to Regulation 12(1) of CIRP Regulations provides as follows:

*“Provided that a creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit his claim with proof to the interim resolution professional or the resolution professional, as the case may be, up to the date of issue of request for resolution plans under regulation 36B or ninety days from the insolvency commencement date, whichever is later:*

*Provided further that the creditor shall provide reasons for delay in submitting the claim beyond the period of ninety days from the insolvency commencement.”*

The above regulation came into effect on 18.09.2023, by way of an amendment to the CIRP regulations. However, prior to the amendment, a creditor was required to submit a claim on or before the ninetieth day of the insolvency commencement date. The last date for submission of Resolution Plan in the present case was 04.03.2020 and the Applicant had filed its claim on 29.12.2022. It is contended that the said amendment is prospective in nature and cannot be applied retrospectively. Thus, the CIRP Regulation, as it stood prior to the amendment, ought to be applied in the present case. Hence, it is evident that the Applicant failed to file its claim within the stipulated timeline.

**13.** The Respondent/Resolution Professional submitted that the claim of the Applicant is not maintainable as the same does not qualify as a debt in terms of the definition of the financial debt as defined under section 5(8) of the Code as the claim has been filed with respect to the amounts disbursed for allotment of units to Homebuyers in the Project. The Applicant Bank is neither a secured nor a Financial Creditor of the Corporate Debtor. A bare reading of the Tripartite Agreement, clearly indicate that the Applicant had granted loan to Home Buyers and not to the Corporate Debtor.

**14.** It is contended by the Resolution Professional that the Applicant herein relied upon the Tripartite Agreements executed amongst the Homebuyer, the



Applicant and the Corporate Debtor for establishing its status as "secured creditor" of the Corporate Debtor. However, the Applicant has conveniently ignored the fact that Builder's liability to refund the amount arises only if -

- a. the builder fails to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s); or*
- b. the builder fails to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank; or*
- c. if the Borrower fails to pay his stipulated margin amount.*

**15.** It is submitted that The Builder has neither failed to provide the original, executed, duly stamped and registered agreement for sale, original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s) nor failed to ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank. Infact, clause 6.11 of the Resolution Plan specifically provides for handing over of flats to the homebuyers and as such, security in favour of the bank can only be created thereafter. Furthermore, the Applicant has not given any detail in its application as to how the borrower has failed to pay the margin money and as such, the Applicant cannot rely on the same without any specific pleading to that effect.

**16.** It is submitted that the Respondent has already admitted the claim of four flats out of six flats, for which the Applicant has filed the present Application. Furthermore, the Said Flats, for which the Applicant has sanctioned loans have been allotted multiple times by Mr. Vinay Jain. Clause 9.5(v) of the Resolution Plan provides for submission of claims by allottee/unit holder/flat/shop owner who had failed to file the same with the Resolution Professional or who had filed it but the same was under verification, within 45 days of the approval of the Resolution Plan. Thus, once the plan is approved, the home-buyers would have the opportunity to file the claims and there is no extinguishment of the claims during such protected period. The rest of the Homebuyers (i.e. remaining two homebuyers out of six financed by the Applicant) who have not filed their claims with respect to the units



financed by the Applicant may file their claims within 45 days of approval of Resolution Plan and this would lead to duplicity of claims with respect to same flats in case Applicant's claim is admitted by the Ld. Adjudicating Authority. Further, the Applicant has the option to recover its dues from the borrower i.e. the homebuyer and it is not remediless if its claim is rejected by this Adjudicating Authority.

### **17. Analysis and Findings**

- i. Heard the Ld. Counsel appearing for both the parties and have perused the records.
- ii. In the instant case, the Applicant Bank has sought a direction to the Resolution Professional to admit the claim of the Applicant Bank with respect to 6 accounts i.e. with respect to 4 Homebuyers. It is seen from the records that out of these 6 home buyers, the 4 home buyers have filed claims. The Resolution Professional has admitted 4 claims. The remaining 2 Home buyers have not filed any claims so far.
- iii. It is the case of the Applicant that in view of the specific terms of the Tripartite Agreement entered between the Applicant Bank, Homebuyers and the Corporate Debtor, the Applicant assumes the character of the Financial Creditor in terms of Section 5(8) of the Code and therefore, the claim filed by the Applicant ought to be admitted by the Respondent.
- iv. The Applicant Bank relies upon the Clause 3(c) and (e) of the Tripartite Agreement dated 18.06.2015 which are reproduced as under: -

*“c. The Builder undertakes to provide the original, executed, duly stamped and registered agreement for sale original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s) within a period not exceeding 365 days from the date of final disbursement of the loan to the Builder by the Bank. The Builder shall ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank. In the event of failure of the above or in event of any litigation affecting the said property, the Builder shall promptly and immediately refund all the*



*monies disbursed by the Bank together with interest at the rate accrued on such loans including penal interest applicable thereon.*

*In the event, the Borrower(s) requests for cancellation of the allotment/ Agreement for sale, the Builder shall obtain Bank's prior written No Objection Certificate as also remit the loan amount disbursed by the Bank with interest at the rate accrued on such loan including penal interest applicable thereon from the proceeds of the cancellation of Agreement to sale and remit the same directly to the Bank by Banker's Cheque or Demand Draft, favouring the Bank for credit to the Borrower(s) Home loan account and to remit the residual amount to the Borrower/shall arrange to refund the proceed of cancellation of Agreement to sale directly to the Bank under advice to the borrower. If the Borrower(s) fails to pay his stipulated margin amount, the entire amount advanced by the Bank will be refunded by the Builder to the Bank, together with interest due including penal interest, if any. The Builder undertakes to obtain completion certificate and certificate of occupation issued by the Competent Authority in respect of the property and also undertakes that Builder shall not hand over the possession/conveyance deed of the property to the Borrower(s) without the prior written permission of the Bank. The Builder agrees/undertakes and confirms to obtain such written consent from the Bank.*

*e. The Builder hereby undertakes to issue a letter favouring the Bank inter-alia, giving its No Objection for the Borrower(s) creating security in favour of the Bank, by way of mortgage, of the right, title, interest of the Bank in the shares allotted to him/her/them and of the said flat for repayment of the loan and all amounts in respect thereof by the Borrower(s), to note the charge of the Bank on the said flat(s) in its records as security against the Loan advanced by the Bank to the*



*Borrower(s) and not to permit the Borrower(s) to transfer/encumber the said property, without prior written permission of the Bank. The Builder hereby irrevocably and unconditionally guarantees the due repayment to the Bank of all the amounts disbursed to the Builder together with all interests and all other monies, owing and payable by the Borrower's to the Bank, in the event of any breach by the builder of any warranty, representation covenant, or agreement contained herein.*

- v. The Ld. Counsel for the Applicant Bank submitted that since the Corporate Debtor failed to provide original sale deed in favour of the Borrower and/or create any security in favour of the Bank in absence of registered sale deed, the Corporate Debtor is liable to repay the debt in terms of the irrevocable and unconditional guarantee provided in the clauses above. Therefore, the Applicant Bank assumes the character of the Financial Creditor in terms of Section 5(8) of the Code.
- vi. The Ld. Counsel for the Applicant placed reliance upon the Order dated 09.01.2025 in the case of Canara Bank vs. Sh. Vivek Kumar, Resolution Professional of M/s AVJ Developers (India) Private Limited, Comp. App. (AT)(Ins) 390 of 2023, wherein the Hon'ble NCLAT referred to Clause 16 of the Tripartite Agreement executed by Canara Bank, the Corporate Debtors and the Allottees therein, to hold that there is a clear obligation to repay upon the Corporate Debtor, albeit in the event of default. It is submitted that the said Clause 16 of the Tripartite Agreement is similar to the Clause 3 of the Tripartite Agreement executed by Bank of Baroda to the extent it captures the obligation of the Corporate Debtor to pay under crystalized events.
- vii. In reply, the Ld. Counsel for the Respondent/Resolution Professional submitted that the above clause applies only in the event of the failure of the builder to create a security in favour of the bank. Such an occasion would only arise after approval of the resolution plan as the builder (as Successful Resolution Applicant), would handover the possession of the flats to the homebuyers as per clause 6.11 of the Resolution Professional.



- viii. The Ld. Counsel for the Respondent submitted that the Hon'ble NCLAT vide its Order dated 09.01.2025 remanded the matter back to this Adjudicating Authority to decide the issue.
- ix. The Ld. Counsel for the Respondent/Resolution Professional submitted that Clause 4 of the Recital and Clause 2 of the Tripartite Agreement, makes it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416.***

The relevant clause of the Tripartite Agreement are reproduced as under:

***“Clause 4 of the Recital to the Tripartite Agreement,***  
*which state that the borrower authorised the Applicant to disburse the loan amount directly to the Corporate Debtor and the sum advanced by the Applicant to the borrower and remitted by the Applicant directly to the Corporate Debtor shall be deemed as disbursed by the Applicant to the borrower.*

***Clause 2 of the Tripartite Agreement:***

***Obligations of the Borrower(s):***

*The Borrower(s) shall unconditionally consent for disbursement to the entire loan amount upfront/in instalments as per agreement for sale dated/allotment letter dated 27.05.2015 to the Builder on the basis of the demand notice issued by the Builder. The Borrower(s) will arrange to remit the margin amount directly to the Builder and furnish receipt issued by the Builder evidencing remittance of margin amount/will arrange to remit the margin amount to the credit of Home Loan Account to enable the Bank to pay the consolidated amount (margin and loan) directly to the Builder.*

*1. The Borrower(s) undertakes to create and complete the equitable mortgage formalities immediately on receipt of the conveyance/sale deed duly executed, stamped and registered.*



2. *The Borrower(s) shall execute all necessary loan documents at the time of sanction of Home Loan for purchase of the said property.*

3. *The Borrower(s) undertakes to liquidate the loan sanctioned to him on demand by the Bank regardless of the progress in construction/ completion of the project and indemnify the Bank for any loss occasioned on account of delay in construction of the house/flat in terms of the construction schedule in the Agreement for sale/Allotment letter by the Builder, including but limited to claims of the Bank for interest, penal interest, damages, costs, etc. on the outstanding amount of the loan extended to the said Borrower(s) by the Bank for purchase of flat/house in terms of construction schedule as mentioned in the Agreement for Sale/Allotment letter dated 27.05.2015.”*

- x. At this juncture, it may be noted that an amendment was made in Section 5(8)(f) of the Code to enable the Homebuyers/allottees to act as Financial Creditor and to participate in the CoC. The Applicant Bank's case is that Clause 3 of the Tripartite Agreement in the present case agrees for payment in favour of the Applicant in terms of Section 3(6) of the Code and since, the Applicant gets a right to payment, it has to be classified as Financial Creditor to the extent of its money due to be paid by the Corporate Debtor in terms of Clause 3 of the Tripartite Agreement.
- xi. It may also be noted that the amendment brought under Section 5(8)(f) of the Code which classified the homebuyers/allottees as Financial Creditors was challenged before the Hon'ble Supreme Court and the constitutional validity of Section 5(8)(f) of the Code was upheld by the Hon'ble Supreme Court in the case of ***Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.***, reported in ***(2019) 8 SCC***.
- xii. The Clause 4 of the Recital to the Tripartite Agreement in the present case is reproduced hereunder for ready reference.



**“Clause 4 of the Recital to the Tripartite Agreement: -**

*The Borrower(s) has requested Bank of Baroda to sanction/disburse loans in favour of the Borrower(s) on the basis of the agreement for sale dated/allotment letter dated 27.05.2015. No Objection Certificate issued by the Builder, receipts issues by the Builder favouring the purchaser of property evidencing payment of margin money.*

- xiii. The Recital to the Clause 4 of the Tripartite Agreement provides that it is the Borrower/Homebuyer and not the Builder/Corporate Debtor who has approached the Bank seeking loan for purchasing the flat. It is the Borrower/Homebuyer who has authorized the Bank to disburse the above said loan amount directly to the Builder/Corporate Debtor. This shows that the Bank has acted on the instruction of the Homebuyer and not otherwise. Therefore, the submissions made on behalf of the Applicant-Bank that the Applicant assumes the character of Financial Creditor defined under Section 5(7) of the Code just because the Builder takes the liability/responsibility to repay the debt amount to the Bank in case of default cannot be accepted.
- xiv. It will also be pertinent to refer to Section 5(8) of the Code at this stage, which defines the word “Financial Debt” as well as Clause (a) and (f) of Section 5(8) of the Code, which read as under: -
- “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
- (a) money borrowed against the payment of interest;*
- ....*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
- [Explanation. - For the purposes of this sub-clause-*
- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*



- xv. From the plain reading of the above definition of '*Financial Debt*' under Section 5(8) of the Code, 2016, it is evident that the first and foremost ingredient/requirement for classifying a debt as a '*financial debt*' is that the money must be disbursed against the consideration for the time value of money, involving borrowing with an obligation to pay interest. In the present case, the amount is raised by the Corporate Debtor from the Homebuyer and therefore, the real Financial Creditors in terms of Section 5(8)(f) of the Code are the Homebuyers as the loan was availed by the Homebuyers from the Bank which has not directly advanced the money to the Corporate Debtor and only acted on instructions of the Homebuyers in disbursing the loan amount to the Builder. The Clause 3 of the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, entitles the Bank to recover the same can only be termed as an indemnity clause under the tripartite agreement. The mere existence of a clause in the Tripartite Agreement stipulating that the Builder would be liable to repay the loan to the Bank in event of default, does not alter the intrinsic nature of the transaction between the Bank and the Homebuyer. It is a settled principal of law that that terms of a contract/agreement cannot override or supersede statutory provisions. The provisions in a contract/agreement that conflicts with statutory mandate are generally considered invalid and unenforceable.
- xvi. It may further be added that the debt in question has been disbursed by the Bank to the Corporate Debtor on the instructions of the homebuyer so as to enable the homebuyer to purchase the flat. Such an arrangement made by the Bank and the Homebuyer will not change the character of the financial debt and place the bank in the category of a Financial Creditor. The relevant clauses in the tripartite agreement have been incorporated for the sake of convenience of the Bank. Under the Tripartite Agreement, it is the homebuyer who is availing the finance from the Bank and creating the charge in favour of the Bank by giving an undertaking to keep the bank indemnified against any loss.



Therefore, the Bank cannot be termed as the Financial Creditor of the Corporate Debtor and the claim of the bank cannot be accepted as the Financial Creditor as no facility has been disbursed to the Corporate Debtor.

xvii. In order to ascertain the treatment given to the Homebuyers who have either submitted belated claims or have not submitted any claims as well as that of the bank who is claiming to be given the status of the financial creditor in place of such Homebuyers, I have perused the Resolution Plan which is already on record and filed along with the IA (R.Plan)-33/(PB)/2024 filed by the Resolution Professional seeking approval of the Resolution Plan and pending before this Adjudicating Authority. Although the copy of the Resolution Plan has not been placed on record in the instant application, however, in order to determine the issue involved, it is appropriate to refer and rely on the Resolution Plan which is part of the IA (R. Plan)-33/(PB)/2024.

**xviii. The relevant paragraph of the Resolution Plan is Para 9.7 of Chapter 9: -**

*“Settlement of Outstanding Liability of the Resolution Plan, deals with the claims of the Banks against Homeloans and Tripartite agreement with Flat owners.”*

Sub-clause (a) of Paragraph 9.7 of the Resolution Plan reads as under:

*“(a) The separate details in this regard has not been given in the IM, but the claim lodged or to be lodged by the bank on the strength of Tripartite Agreement shall be treated as unsecured creditor and shall be settled by Resolution Applicant which will be paid in 2 quarterly equal instalments after 365 days from the date of approval of the Resolution Plan by the Hon'ble NCLT.”*

Sub-clause (b) of Paragraph 9.7 of the resolution plan reads as under:

*“(b) For the banks who have been subrogated in the position of flat owners by virtue of right exercised under tripartite agreement are unsecured financial creditors and for the*



*satisfaction of the debt, the same shall be pay off as unsecured creditors as mentioned in Chapter-6.”*

- xix. A perusal of the sub clause (a) of Para 9.7 of the Resolution Plan shows that the claim, if any be lodged by the Bank on the strength of Tripartite Agreement shall be treated as unsecured creditor. The clause (b) of Para 9.7 of the Resolution Plan stipulates that banks who have been subrogated in the position of flat owners by virtue of right exercise under the tripartite agreement are unsecured financial creditors and for the satisfaction of the debt, the same shall be paid off as unsecured creditors as mentioned in Chapter VI of the Resolution Plan.
- xx. At this stage, it may be clarified that no view or opinion is being expressed with respect to the Resolution Plan, even though certain paragraphs of the Resolution Plan have been referred to.
- xxi. In view of the foregoing discussion, the prayers of the Applicant-Bank in the present case cannot be allowed. Therefore, the present application is **dismissed**.

No order as to costs.

**-Sd/-**

**(BACHU VENKAT BALARAM DAS)  
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH, COURT-III**

IA-1006/2024  
In  
IB-654(PB)/2019

**IN THE MATTER OF IB-654(PB)/2019:**

**VISHAL FABRICS & ORS.**

**.... FINANCIAL CREDITORS**

**VERSUS**

**M/s AVJ DEVELOPERS (INDIA) PVT. LTD.**

**.... CORPORATE DEBTOR**

**AND IN THE MATTER OF IA-1006/2024:**

**BANK OF BARODA**

*Through its Authorized Representative Mr. Anirudh Sharma.*

*Having its Head Office at:*

*7th Floor, Baroda Bhavan, R. C. Dutt Road, Vadodara- 390007.*

*Having Branch Office at:*

*ROSARB, 4th Floor, Rajender Bhawan, Rajender Place, New Delhi-110008.*

**..... APPLICANT BANK**

**VERSUS**

**MR. VIVEK KUMAR**

**(Resolution Professional of AVJ Developers (India) Pvt. Ltd.**

R/o C-604, Rosewood Apartments,

Mayur Vihar-I, Ext., New Delhi-110091.

**.....RESPONDENT**

**Order Pronounced On: 14.11.2025**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For Applicant : Mr. Sougat Sinha, Adv.

For Respondent : Mr. Saurabh Kalia, Ms. Mani Gupta, Mr. Aman  
Choudhary, Advs. Mr. Vivek Kumar (RP)



## **ORDER**

**PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)**

1. I have the advantage of going through the order authored by my Learned Brother Member (J). I have perused the comprehensive order and with utmost respect to the views expressed by my learned brother on the Bench, I find myself unable to concur with the opinion.
2. The present Application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 by the Applicant/Bank of Baroda seeking a direction to the Respondent/Resolution Professional to accept the claims of the Applicant and to secure the assets charged to the Bank.
3. It is the case of the Applicant that the Applicant Bank filed its claim on 29.12.2022, vide six separate claim forms filed its claim as a Financial Creditor for an amount of Rs. 3,07,71,916.55/- (Rupees Three Crore Seven Lacs One Thousand Nine Hundred Sixteen and Fifty Five Paise), with respect to the amounts disbursed for allotment of units to homebuyers in the Project. The claims relate to the flats bearing flat nos. D-1007, K-1805, K-1807, B- 1701, A-1907, A-2104.
4. It is submitted that the Respondent/Resolution Professional vide email dated 28.04.2023 rejected the claim of Applicant on two grounds as mentioned below:
  - (i) That the last date of submission of claim expired on 07.10.2021, and
  - (ii) That, an Application bearing No. IA 5385/2021 has been filed under section 30(6) of the IBC, 2016 before the Hon'ble NCLT for approval of the Resolution Plan.
5. It is submitted by the Applicant that under Clause 3(c) of these Tripartite Agreements, the obligations of the Corporate Debtor are clearly defined, and the terms are binding on the Corporate Debtor, the Resolution Professional, and the Successful Resolution Applicant, who cannot alter or dilute the Bank's rights. The Corporate Debtor agreed that in case of delay or failure to execute the sale deed or deliver possession within 365 days from the final



disbursement, the Bank may take all necessary steps to obtain the sale deed or possession in its own favour. The builder must refund all disbursed amounts with accrued and penal interest if it fails to execute the sale deed or if litigation affects the property. Similarly, if the borrower fails to pay the margin money, the builder must refund the Bank's entire disbursed amount with interest. The builder is also obligated to obtain the completion certificate and cannot hand over possession or execute the conveyance deed to the borrower without the Bank's consent.

6. The Applicant Bank relies upon the Clause 3(c) and (e) of the Tripartite Agreement dated 18.06.2015 which are reproduced as under: -

*“c. The Builder undertakes to provide the original, executed, duly stamped and registered agreement for sale original registration receipt and letter of authority from Sub-registrar and/or sale deed in favour of the Borrower(s) within a period not exceeding 365 days from the date of final disbursement of the loan to the Builder by the Bank. The Builder shall ensure that effective security is created in favour of the Bank in the manner prescribed by the Bank. In the event of failure of the above or in event of any litigation affecting the said property, the Builder shall promptly and immediately refund all the monies disbursed by the Bank together with interest at the rate accrued on such loans including penal interest applicable thereon.*

*In the event, the Borrower(s) requests for cancellation of the allotment/ Agreement for sale, the Builder shall obtain Bank's prior written No Objection Certificate as also remit the loan amount disbursed by the Bank with interest at the rate accrued on such loan including penal interest applicable thereon from the proceeds of the cancellation of Agreement to sale and remit the same directly to the Bank by Banker's Cheque or Demand Draft, favouring the Bank for credit to the Borrower(s) Home loan account and to remit the residual*



*amount to the Borrower/shall arrange to refund the proceed of cancellation of Agreement to sale directly to the Bank under advice to the borrower. If the Borrower(s) fails to pay his stipulated margin amount, the entire amount advanced by the Bank will be refunded by the Builder to the Bank, together with interest due including penal interest, if any. The Builder undertakes to obtain completion certificate and certificate of occupation issued by the Competent Authority in respect of the property and also undertakes that Builder shall not hand over the possession/conveyance deed of the property to the Borrower(s) without the prior written permission of the Bank. The Builder agrees/undertakes and confirms to obtain such written consent from the Bank.*

*e. The Builder hereby undertakes to issue a letter favouring the Bank inter-alia, giving its No Objection for the Borrower(s) creating security in favour of the Bank, by way of mortgage, of the right, title, interest of the Bank in the shares allotted to him/her/them and of the said flat for repayment of the loan and all amounts in respect thereof by the Borrower(s), to note the charge of the Bank on the said flat(s) in its records as security against the Loan advanced by the Bank to the Borrower(s) and not to permit the Borrower(s) to transfer/encumber the said property, without prior written permission of the Bank. The Builder hereby irrevocably and unconditionally guarantees the due repayment to the Bank of all the amounts disbursed to the Builder together with all interests and all other monies, owing and payable by the Borrower's to the Bank, in the event of any breach by the builder of any warranty, representation covenant, or agreement contained herein.*

- 7.** The Ld. Counsel for the Applicant Bank submitted that since the Corporate Debtor failed to provide original sale deed in favour of the Borrower and/or



create any security in favour of the Bank in absence of registered sale deed, the Corporate Debtor is liable to repay the debt in terms of the irrevocable and unconditional guarantee provided in the clauses above. Therefore, the Applicant Bank assumes the character of the Financial Creditor in terms of Section 5(8) of the Code.

8. The Ld. Counsel for the Applicant placed reliance upon the Order dated 09.01.2025 in the case of Canara Bank vs. Sh. Vivek Kumar, Resolution Professional of M/s AVJ Developers (India) Private Limited, Comp. App. (AT)(Ins) 390 of 2023, wherein the Hon'ble NCLAT referred to Clause 16 of the Tripartite Agreement executed by Canara Bank, the Corporate Debtors and the Allottees therein, to hold that there is a clear obligation to repay upon the Corporate Debtor, albeit in the event of default. It is submitted that the said Clause 16 of the Tripartite Agreement is similar to the Clause 3 of the Tripartite Agreement executed by Bank of Baroda to the extent it captures the obligation of the Corporate Debtor to pay under crystalized events.
9. In reply, the Ld. Counsel for the Respondent/Resolution Professional submitted that the above clause applies only in the event of the failure of the builder to create a security in favour of the bank. Such an occasion would only arise after approval of the resolution plan as the builder (as Successful Resolution Applicant), would handover the possession of the flats to the homebuyers as per clause 6.11 of the Resolution Professional.
10. The Ld. Counsel for the Respondent/Resolution Professional submitted that Clause 4 of the Recital and Clause 2 of the Tripartite Agreement, makes it is clear that the loans were disbursed to the individual homebuyers and not the Corporate Debtor as per the law laid down by the Hon'ble Supreme Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416***. The relevant clause of the Tripartite Agreement are reproduced as under:

***“Clause 4 of the Recital to the Tripartite Agreement,***  
*which state that the borrower authorised the Applicant to*  
*disburse the loan amount directly to the Corporate Debtor and*



*the sum advanced by the Applicant to the borrower and remitted by the Applicant directly to the Corporate Debtor shall be deemed as disbursed by the Applicant to the borrower.*

**Clause 2 of the Tripartite Agreement:**

**Obligations of the Borrower(s):**

*The Borrower(s) shall unconditionally consent for disbursement to the entire loan amount upfront/in instalments as per agreement for sale dated/allotment letter dated 27.05.2015 to the Builder on the basis of the demand notice issued by the Builder. The Borrower(s) will arrange to remit the margin amount directly to the Builder and furnish receipt issued by the Builder evidencing remittance of margin amount/will arrange to remit the margin amount to the credit of Home Loan Account to enable the Bank to pay the consolidated amount (margin and loan) directly to the Builder.*

*1. The Borrower(s) undertakes to create and complete the equitable mortgage formalities immediately on receipt of the conveyance/sale deed duly executed, stamped and registered.*

*2. The Borrower(s) shall execute all necessary loan documents at the time of sanction of Home Loan for purchase of the said property.*

*3. The Borrower(s) undertakes to liquidate the loan sanctioned to him on demand by the Bank regardless of the progress in construction/ completion of the project and indemnify the Bank for any loss occasioned on account of delay in construction of the house/flat in terms of the construction schedule in the Agreement for sale/Allotment letter by the Builder, including but limited to claims of the Bank for interest, penal interest, damages, costs, etc. on the outstanding amount of the loan extended to the said Borrower(s) by the Bank for purchase of flat/house in terms of construction schedule as*



*mentioned in the Agreement for Sale/Allotment letter dated 27.05.2015.”*

### **Analysis and Findings**

- 11.**In the Order dated 09.01.2025 in the case of Canara Bank vs. Sh. Vivek Kumar, Resolution Professional of M/s AVJ Developers (India) Private Limited, Comp. App. (AT)(Ins) 390 of 2023, the Hon’ble NCLAT referred to the Tripartite Agreement executed by Canara Bank, the Corporate Debtors and the Allottees therein, and held that there is a clear obligation to repay upon the Corporate Debtor in the event of default. The Hon’ble NCLAT in its order dated 09.01.2025 has given specific findings after detailed analysis that cannot be ignored. The operative portion states: *“We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis-a-vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.”*
- 12.**The Hon’ble NCLAT concluded that *“In view of above detailed discussion, the appeal succeeds. The Impugned Order is set aside and IA No. 836/2023 in C.P. (IB) No. 654(PB)/2019 is restored to its original number and the matter is remanded back to the Tribunal for reassessment of the case, in accordance with law.”*
- 13.**Hon’ble NCLAT in order dated 9.1.2025 has taken the view that the Tripartite Agreement (TPA) is materially different from Value Infracon as it creates a direct liability on the Builder and has categorically recorded in Para 79 that *“...the Corporate Debtor/Builder has undertaken to refund the entire amount advanced by the Bank in case of event of default of repayment of the loan.”*
- 14.**The undisputed fact is that the Applicant Bank directly disbursed loan amounts to the Corporate Debtor/Builder, albeit on behalf of and on the instructions of the homebuyer and money reached the Corporate Debtor from the Bank.



- 15.** In this case also Clause 3(c) and (e) of the Tripartite Agreement provides that upon borrower's default or any specified event due to which the loan is not utilised for purchase of the flat, the entire amount advanced by the Bank shall be refunded by the Builder to the Bank. The TPA does not merely indemnify the Bank, it creates a direct contractual obligation upon the Corporate Debtor to refund the entire amount advanced by the Bank in case of specified defaults and upon the occurrence of specified events.
- 16.** Further the Borrower authorized the Bank to disburse loan to the Builder and the Builder undertook to refund all amounts disbursed in case of specified defaults. With these provisions in TPA the Bank steps into the shoes of the homebuyer upon disbursing funds and occurrence of defaults acquires the right to enforce the refund from the Builder. The agreement creates a structure where the homebuyer's receivable from the Builder is, by contract, assigned to the Bank to the extent of loan disbursed.
- 17.** The Corporate Debtor received funds from the Bank to complete the real estate project. The homebuyers obtained financing from the Bank to enable them to purchase units. The Tripartite Agreement was structured such that Builder would receive the funds directly from the Bank and the Corporate Debtor undertook a contractual obligation to refund the entire amount to the Bank in case of default or failure to complete the project. This arrangement clearly has the commercial effect of a borrowing with the home buyers as intermediaries within the meaning of Section 5(8)(f) of the Code.
- 18.** Section 5(8) requires disbursement against consideration for time value of money. In this case loan amounts were directly disbursed by the Bank to the Corporate Debtor for construction and the refund obligation carries interest. The terms of Clause 3(c) and (e) satisfies requirements of Section 5(8)(i) of guarantee and Section 5(8)(f) requirements of commercial effect of borrowing therefore, a financial debt exists. Bank's claim is a valid "Financial Debt" under Section 5(8) and the Bank acquires the status of a "Financial Creditor".



- 19.** The Homebuyer may have approached the Bank seeking the loan but this not this negate the fact that TPA creates a direct and primary obligation upon the Corporate Debtor to refund the loan amount to the Bank in case of occurrence of specified events. The initial genesis of the transaction does not negate the contractual obligation that was ultimately created in favour of the Bank against the Corporate Debtor. The Corporate Debtor entered into the Tripartite Agreement voluntarily, agreed to receive money directly from the Bank, and it agreed to undertake the obligation to refund this money in specified circumstances. The Resolution Plan itself recognizes this by providing for treatment of bank as Financial Creditor. If the Bank had no claim at all, there would be no need for such a provision in the Resolution Plan.
- 20.** In cases were the homebuyers who have not filed any claims, if the Bank's claim is rejected, there will be no claim admitted in respect of these accounts despite the Corporate Debtor having received the money. This would lead to a situation where the Corporate Debtor which has failed to complete the project, would escape liability for substantial amounts it received, simply because the homebuyers have not filed claims.
- 21.** Once the Appellate Tribunal in CA 390 of 2023 has determined that in case the Builder/Corporate Debtor expressly undertook the liability to refund the entire amount advanced by the Bank, it creates a direct financial obligation upon the Corporate Debtor to refund the amount back to the Bank. This Adjudicating Authority cannot return to the reasoning was rejected by the Hon'ble NCLAT in its Order dated 09.01.2025. In view of the findings of the Hon'ble NCLAT, the Bank's claim based upon the Clause 3(c) and (e) of the Tripartite Agreement qualifies as a Financial Debt as defined under Section 5(8) of the Code and must be admitted as such.
- 22.** In light of the above findings of Hon'ble NCLAT in CA 390 of 2023, the Ld. Bengaluru Bench in the case of Kotak Mahindra Bank v. Prasanna Kumar Rath & Ors., in IA-713/2024 vide Order dated 07.08.2025 came to the following findings: -



“4. We have heard the Learned Counsel for the Applicant and RP and gone through the material available on record. Apparently, the RP not considered the claim made by the Applicant on the basis of the decision in Axis Bank Vs Value Infracon India Pvt Ltd Case.

5. The Counsel during the course of hearing cited latest judgement of the Hon’ble NCLAT bearing Company Appeal (AT) (Ins.) No.390 of 2023 in the case of Canara Bank vs. Shri.Vivek Kumar and referred to Para-77 of the decision passed by the Hon’ble NCLAT. Para 77 to 80 of the judgment are extracted below:

“We have already taken into consideration that the Impugned Order rejected the claims of the Appellant mainly based on the judgment of the Hon’ble Supreme Court of India in the matter of Pioneer Urban Land (Supra) and this Appellate Tribunal in the case of Value Infracon India Private Limited (Supra). The Impugned Order passed by the Adjudicating Authority stated that the bank did not finance the Corporate Debtor and real financial creditors are the homebuyers and based on the judgment of this Appellate Tribunal Value Infracon India Private Limited (Supra) the Adjudicating Authority rejected the case of the Appellant.

78. We have examined both the cases in greater details in preceding paragraphs as well as legal provisions of the Code and various clauses of the Comp. App. (AT) (Ins.) No. 390 of 2023 agreement specially in contrast with provisions of the Tripartite Agreement of the present case vis- a vis Value Infracon India Private Limited (Supra), as such we find that the Adjudicating Authority has erred in not considering the aspects brought out by the Appellant in the present appeal.

79. The Appellant Bank has directly disbursed the amount to the Corporate Debtor/Builder, albeit, on behalf of the Borrowers/Homebuyers and in terms of the Tripartite Agreements amongst the Allottees, Builder and the Bank, the Corporate Debtor/ Builder has undertaken to refund the entire



*amount advanced by the bank in case of event of default of repayment of loan.”*

*6. It is seen that in this case also there is a tripartite agreement between the Homebuyers, Corporate Debtor and PNB Housing Finance Limited which is placed at pages 329 to of the petition. Clause 7 of the Tripartite Agreement is reproduced below. As per Clause 7 of this Agreement and,*

*“7. That the Builder, in the event of default of repayment of loan by the Borrower shall on written intimation instructions of PNBHFL cancel the allotment of said property of the Borrower and refund the amount standing to the credit of borrowers in the books of developers account by PNBHFL directly to PNBHFL and the Builder shall have right to recover/forfeit the earnest money.” Further Clauses 7-14 lay down the undertaking given by the Builder.*

*7. Hence, the facts of this case are similar to the matter decided by the Hon’ble NCLAT in respect of the Tripartite Agreement and also considering the Clause 7 of the Agreement, It has to be held that the present Assignee namely the KOTAK MAHINDRA BANK has to be considered as a Finance Creditor in respect of the Amounts advanced by the then Assignor PNB Housing Finance Limited.*

*8. In view of the above Discussion, this present application is liable to be allowed. Accordingly, IA No.713 of 2024 is allowed with the following direction.*

*The Respondent No. 1 is directed to admit the claim of the Applicant as Financial Creditor replacing the Respondent No. 2 to No. 5 to the extent of the claim of the Applicant in accordance with the right of subrogation pursuant to the terms of Tri-partite Agreement and consequently reconstitute the Committee of Creditors by including the Applicant along with entitled voting share to the Applicant in the Committee of Creditors.*



*In View of this direction, separate orders on other prayers at a, b and c separately are not considered necessary.”*

**23.** Further, the Ld. Delhi Bench-II in the case of Indian Bank v. Ansal Properties & Infrastructure Ltd. in IA-6224/2024 vide Order dated 25.04.2025 placing reliance on Hon'ble NCLAT's Canara Bank Order directed the Successful Resolution Applicant and Resolution Professional to file an affidavit that the Resolution Plan would be implemented in due deference to the Hon'ble NCLAT's judgment.

**Conclusion**

**24.** After careful consideration of the entire matter, including the specific directions of the Hon'ble Supreme Court and the detailed analysis by the Hon'ble NCLAT, we arrive at the following conclusions:

- (a) The Tripartite Agreement creates a direct and primary contractual obligation upon the Corporate Debtor/Builder to refund the entire loan amount to the Applicant Bank in case of various specified events.
- (b) This clause is fundamentally different from the corresponding clause in the Value Infracon case, where there was no such obligation of repayment by the Builder to the Bank.
- (c) The disbursement by the Bank directly to the Corporate Debtor, coupled with the Corporate Debtor's undertaking to refund this amount, constitutes a transaction having the commercial effect of a borrowing within the meaning of Section 5(8)(f) of the IBC.
- (d) The fact that the initial loan agreement was between the Bank and the homebuyer does not negate the separate debt obligation created by TPA in favour of the Bank against the Corporate Debtor.
- (e) The Applicant Bank qualifies as a Financial Creditor of the Corporate Debtor under Section 5(7) read with Section 5(8) of the Insolvency and Bankruptcy Code, 2016.
- (f) The Resolution Plan itself recognizes banks deriving claims from Tripartite Agreements as financial creditors.



(g) The delay in filing the claim cannot be a ground for rejection when the Resolution Plan itself provides for filing of claims within 45 days of its approval and the Plan has not yet been approved.

To again reject the Bank's claim after the Hon'ble NCLAT's detailed analysis finding error in the earlier rejection would not be in accordance with the appellate directions and would frustrate the judicial process.

### **Order**

- i. In view of the relevant clauses of the Tripartite Agreement, the findings of the Hon'ble NCLAT and the above mentioned Orders of the coordinate Benches i.e. Ld. Bengaluru Bench and Ld. New Delhi Bench-2, this Adjudicating Authority holds the Applicant Bank to be a Financial Creditor of the Corporate Debtor.
- ii. It is ordered that the Applicant Bank, be recognized as a Financial Creditor of the Corporate Debtor for all those cases where claim has not been filed by the Homebuyer and based on the contractual obligation created under the Tripartite Agreement, the Resolution Professional is directed to admit the claim of the Applicant Bank. Consequently, the Applicant is entitled to be treated as a Financial Creditor for all purposes of CIRP, including participation in the Committee of Creditors and distribution under the Resolution Plan.
- iii. This order does not prejudice the rights of homebuyers who may file their own claims. If any homebuyer in respect of whose loan the Bank's claim is admitted subsequently files a claim within the timeline provided in the Resolution Plan, the Resolution Professional shall examine such claim independently. In case of any overlap or duplication between the Bank's claim and a Homebuyer's claim in respect of the same unit, appropriate adjustments shall be made to avoid double counting, with priority given to the Homebuyers.
- iv. The present application stands allowed to the extent indicated above.

**-Sd/-**

**(DR. SANJEEV RANJAN)**  
**MEMBER (TECHNICAL)**