

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 180 of 2022

IN THE MATTER OF:

Greater Noida Industrial Development Authority (GNIDA)
Through Its Chairman,
Plot No.1, Knowledge Park-04,
Greater Noida, Gautam Bugh Nagar,
Uttar Pradesh-201308..... Appellant

Vs

Roma Unicon Designex Consortium,
Successful Resolution Applicant
(Through Its SPVRoma Urban Dream
Projects Pvt. Ltd.) Through Its
Authorised Representative-
Mr. Suresh Kumar Gupta
S6-803, Saraswati (Group-II) HIG,
D6, Vasant Kunj, Delhi-110070..... Respondent

Present:

For Appellant:

**Mr. U. N. Singh with Md. Faisal
Masood, Advocates.**

For Respondents:

**Mr. G.P. Madaan, Mr. Ashish Makhija,
Ms. Akanksha Vasudeva, Aditya
Madaan, Harimohana, Advocates
Aishwarya Adlakha, for Erstwhile RP.**

**Mr. Abhishek Anand, Mr. Prateek
Kushwaha, Mr. Nipun Gautam, Mr.
Sajal Jain, Advocates for R-1/SRA**

With

Company Appeal (AT) (Insolvency) No. 629 of 2022

IN THE MATTER OF:

Greater Noida Industrial Development Authority (GNIDA)
Through Its Chairman,
Plot No.1, Knowledge Park-04,
Greater Noida, Gautam Buddh Nagar,
Uttar Pradesh-201308..... Appellant

Vs

1. Earth Infrastructures Limited
Through RP Mr. Akash Singhal
G-8 & 9, GROUND FLOOR, HANS BHAWAN
1, BAHADUR SHAH ZAFAR MARG
NEW DELHI-II0002
2. Alfa Corp Development Pvt. Limited
(Resolution Applicant for Earth Infrastructure Limited]
6th Floor, Golf View Corporate Tower
Tower-A, Sector-42, Golf Road,
Gurugram-122002
3. Sh. Sanjay Bhalla (Representative)
Member of Monitoring Committee
S/o Late Ram Nath Bhalla,
12/C, C-3, Street Sainik Farm
New Delhi-110062. Respondents

Present:

For Appellant:

**Mr. Krishnendu Datta, Sr. Advocate
with Mr. Manish Kumar Srivastava,
Manpreet Kaur, Ms. Varsha
Himatsingka, Mr. Kartik Pandey, Mr.
Sagar Arora, Mr. Aaditya Mishra,
Advocates**

For Respondents:

**Mr. G.P. Madaan, Mr. Ashish Makhija,
Ms. Akanksha Vasudeva, Aditya
Madaan, Harimohana, Advocates
Aishwarya Adlakha, for R-1.**

**Mr. Vivek Kohli, Sr. Advocate with
Mr. Sandeep Bhuraria, Ms. Parijat
Singh, Mr. Arinjay Singh, Advocates
for R-2.**

**Mr. Arshdeep Singh Khurana, Mr.
Hitesh Rai, Mr. Harsh Mittal,
Advocates for R-3.**

**Mr. M.P. Sahay, Ms. Awantika and Mr.
Sachin Kharb, Advocates for
Homebuyers.**

**Mr. Akshya Makhija, Sr. Advocate,
Mr. Shashank Raghav, Ms.
Shubhangini Yadav, Advocates for
Intervenor.**

**With
Company Appeal (AT) (Insolvency) No. 630 of 2022**

IN THE MATTER OF:

Greater Noida Industrial Development Authority (GNIDA)
Through Its Chairman,
Plot No.1, Knowledge Park-04,
Greater Noida, Gautam Buddh Nagar,
Uttar Pradesh-201308..... Appellant

Vs

1. Earth Infrastructures Limited
Through RP Mr. Akash Singhal
G-8 & 9, GROUND FLOOR, HANS BHAWAN
1, BAHADUR SHAH ZAFAR MARG
NEW DELHI-II0002.
2. Roma Unicon Designex Consortium
Resolution Applicant of
Earth Infrastructures Limited
412, 4th Floor Manglam Paradise
Sector 3, Rohini New Delhi- 110085.
3. Earth Towne Flat Buyers Association (Regd.)
Association of Financial Creditors,
Through Mr. Satyabrata Mitra,
General Secretary,
Office at Plot No.GH-4, Sector-1,
Greater Noida (West),
Gautam Buddh Nagar, U.P.
4. HDFC Bank Limited,
2nd Floor, Express Building,
9-10, Bahadur Shah Zafar Marg,
New Delhi - 110002.
5. Monitoring Committee,
Earth Towne Project,
Represented by its Chairperson
Mr. Akash Singhal..... Respondents

Present:

For Appellant:

Mr. Krishnendu Datta, Sr. Advocate with Mr. Manish Kumar Srivastava, Manpreet Kaur, Ms. Varsha Himatsingka, Mr. Kartik Pandey, Mr. Sagar Arora, Mr. Aaditya Mishra, Advocates

For Respondents:

Mr. G.P. Madaan, Mr. Ashish Makhija, Ms. Akanksha Vasudeva, Aditya Madaan, Harimohana, Advocates Aishwarya Adlakha, for R-1.

Mr. Abhishek Anand, Mr. Nipun Gautam, Mr. Sajal Jain, Mr. Sandeep Bhuraria, Ms. Parijat Singh, Mr. Arinjay Singh, Advocates for R-2.

Mr. Abhijeet Sinha, Ms. Charu Sangwan, Mr. Krishna Raj, Mr. Saikat Sarkar, Advocates for R-6

Mr. Akshya Makhija, Sr. Advocate, Mr. Shashank Raghav, Ms. Shubhangini Yadav, Advocates for Intervenor.



J U D G M E N T

ASHOK BHUSHAN, J.

These three Appeal(s) filed by the same Appellant challenges orders passed by the National Company Law Tribunal, Delhi Bench III, arising out of same Corporate Insolvency Resolution Process, have been heard together and are being decided by this common judgment.

2. The Company Appeal (AT) (Insolvency) No. 630 of 2022 has been filed against the order dated 05.04.2021 passed by Adjudicating Authority on

the Application filed by Resolution Professional (“RP”) under Section 30, sub-section (6), approving the Resolution Plan submitted by Respondent No.2 - Roma Unicon Designex Consortium. Company Appeal (AT) (Insolvency) No. 629 of 2022 has been filed against the order dated 08.06.2021 allowing the Application filed by the RP approving the Resolution Plan submitted by M/s Alpha Corp Development Private Limited – Respondent No.2. Company Appeal (AT) (Insolvency) No. 180 of 2022 has been filed against the order dated 07.12.2021 passed by Adjudicating Authority allowing IA No.4235 of 2021 filed by the Successful Resolution Applicant - Roma Unicon Designex Consortium by issuing direction to the Appellant - Greater Noida Industrial Development Authority (“GNIDA”) to implement the Resolution Plan dated 05.04.2021.

3. As noted above, all the Appeal(s) arise out of CIRP initiated against the same Corporate Debtor i.e. Earth Infrastructure Limited. We need to notice the facts and sequence of events giving rise to these Appeals:

- (i) Greater Noida Industrial Development Authority is an Authority constituted under the provisions of the Uttar Pradesh Industrial Area Development Act, 1976 for the development of certain areas in the Uttar Pradesh into urban and industrial township. The Authority under the above 1976 Act is empowered to acquire the land, develop the same and make allotment of plots on lease basis. The Appellant vide allotment letter dated 19.03.2010 allotted to the Builder Residential/ Large Group Housing Plot No.GH-04, Sector 01,

Greater Noida Uttar Pradesh with area of 73900 sq. mtrs to a Consortium consisting of – (i) M/s Earth Infrastructures Limited; (ii) Raus Infrass Ltd.; and (iii) M/s. Shalini Holdings Limited @ Rs.10050 per sq. mtr.

(ii) Under the terms and conditions of the Builders Scheme, the Consortium was to form a Special Purpose Company (SPC). A separate corporate legal entity namely – M/s Earth Towne Infrastructures Pvt. Ltd. (“**Earth Towne**”) was incorporated on 21.07.2010.

(iii) The Appellant executed a Lese Deed dated 01.09.2010 in favour of M/s Earth Towne Infrastructures Pvt. Ltd., which consisted - M/s Earth Infrastructures Limited as a Lead Member and M/s Raus Infrastructure and M/s Shalini Holdings Ltd. as Members. The Earth Infrastructures Ltd. had 78% of shareholding and other two Members had 11% of shareholding in the Special Purpose Company.

(iv) As per terms and conditions of the registered Lease Deed dated 01.09.2010 M/s Earth Towne Infrastructures Pvt. Ltd. was to develop and market the project on demarcated Plot No.GH-04, Sector 01, Greater Noida. The Lease Deed was executed for consideration of the total premium of Rs.74,26,95,000.00 and 10% premium was paid. Balance 90% premium was to be

payable in 16 half-yearly instalments. Interest @ 12% per annum was to be paid after 24 months.

(v) After the execution of the Lease Deed on 01.09.2010 an unregistered Development Agreement dated 09.09.2010 was entered between Earth Towne and Earth Infrastructures Ltd., where First Party – Earth Towne was to develop the land. The development rights were given to the Earth Infrastructures Ltd. by the Development Agreement. The Development Agreement also stipulated that Earth Towne shall remain the lease right holder of the Scheduled Land and the Second Party shall only have the permission to enter into the Scheduled Land only for carrying out the development/ construction activities, as a Licensee. The area sharing ratio between Earth Towne and Earth Infrastructures Ltd. was 18% and 82%. On an application made by Lessee - Earth Towne, the Appellant had sanctioned building plan for construction on Lease Land. The Project was known as Earth Towne Project.

(vi) Another Lease Deed dated 04.02.2008 was also executed by the Appellant in favour of M/s Neo Multimedia Ltd. A Development Agreement was entered between M/s Neo Multimedia Ltd. and M/s Earth Infrastructures Ltd. on 25.04.2011, under which the development and construction was to be carried out by Earth Infrastructures Ltd. on an area

of 58866.03 sq. mtrs on Plot No.TZ-01, Sector-Tech zone in Greater Noida.

(vii) Similarly a third Lease Deed dated 01.09.2009 was executed by the Appellant in favour of M/s Nishtha Software Pvt. Ltd. A Memorandum of Understanding (“MoU”) dated 20.02.2010 was entered between M/s Nishtha Software Pvt. Ltd. and the Corporate Debtor. A Development Agreement was entered between M/s Nishtha Software Pvt. Ltd. and M/s Earth Infrastructures Pvt. Ltd. for land area of 20911.23 sq. mtrs at Plot No. 48, Sector-Knowledge Park No.05, Greater Noida.

(viii) The Earth Infrastructures Pvt. Ltd. was to develop, as per the Development Agreements, on lands owned by Earth Towne, M/s Neo Multimedia Ltd. and M/s. Nishtha Software Pvt. Ltd. The Earth Infrastructures Pvt. Ltd. started three Projects namely – Earth Towne Project, Earth Techone and Earth Sapphire Court. The building permissions were obtained by the Lessees for the aforesaid three parcel of lands for construction of the Projects advertised. A large number of homebuyers booked the residential flats in the aforesaid three Projects and paid substantial amount, which were received by the Developer and in few cases also by Lessee of the respective land parcels. The Projects were registered with UP RERA.

- (ix) On an Application filed by Financial Creditor - Mr. Deepak Khanna against the Earth Infrastructures Pvt. Ltd. (Corporate Debtor) under Section 7, the Adjudicating Authority by an order dated 06.06.2018 commenced CIRP against the Earth Infrastructures Pvt. Ltd. One Shri Surinder Kumar was appointed as Interim Resolution Professional (“IRP”) and subsequently Shri Akash Singhal was appointed as RP.
- (x) The RP prepared the Information Memorandum in June 2019 regarding the Corporate Debtor, where details of all the three Projects (which are subject matter of three Appeal(s) under consideration) were given. Form-G was issued inviting Expression of Interest for the Corporate Debtor on 19.04.2019. Thereafter on 22.05.2019, while issuing Expression of Interest the Resolution Plans were invited for the entire Project of the Corporate Debtor, individually or collectively.
- (xi) The Appellant on 18.09.2019 has sent a letter to RP claiming dues on the subsidiary of the Corporate Debtor namely Earth Towne for an amount of Rs.148,37,46,148/-, arising out of the Lease Deed executed on 01.09.2010.
- (xii) In pursuance of the request for Resolution Plan, Resolution Plans were submitted. Roma Unicon Designex Consortium filed its Resolution Plan for the Earth Towne Project, which Resolution Plan was approved by the Committee of Creditors

("CoC") in their 14th Meeting held on 26.08.2019 with 100% voting share. The said Resolution Plan was subsequently on an Application filed by the RP has been approved by the Adjudicating Authority vide its order dated 05.04.2021.

Alpha Corp Development Pvt. Ltd. submitted its Resolution Plan for four Projects. The Resolution Plan submitted by Alpha Corp Development Pvt. Ltd. was approved in 19th Meeting of the CoC held on 11.11.2019. On an Application filed by Resolution Professional, the Adjudicating Authority vide its order dated 08.06.2021 approved the Resolution Plan filed by Alpha Corp Development Pvt. Ltd. with regard to two projects, i.e., Earth Sapphire Court and Earth Techone.

(xiii) Company Appeal (AT) (Insolvency) No.630 of 2022 has been filed challenging the order dated 05.04.2021, approving the Resolution Plan of Earth Towne.

(xiv) Company Appeal (AT) (Insolvency) No.629 of 2022 has been filed challenging the order dated 08.06.2021, approving the Resolution Plan submitted by M/s Alpha Corp Development Pvt. Ltd.

(xv) In Company Appeal (AT) (Insolvency) No.180 of 2022, which has been filed against the order dated 07.12.2021, an IA No.4235 of 2021 was filed by Roma Unicon Designex Consortium praying for certain directions against the

Appellant including the direction to transfer the lease land in favour of the Successful Resolution Applicant. The IA No.4235 of 2021 was opposed by the Appellant by filing a reply. It was submitted by the Appellant in reply to the Application that land was allotted to M/s Earth Infrastructure Limited and two other Companies and the lease was executed in the name of Earth Towne Infrastructure Pvt. Ltd. The Respondent (Appellant herein) submitted that proposed transfer is against the terms and conditions of the Lease Deed. The Appellant stated that claim of the Appellant was never vetted, verified and determined, hence, the prayer made in the Application be rejected. The Adjudicating Authority after hearing the parties passed an order on 07.12.2021 allowing IA No.4235 of 2021.

(xvi) The Appellant aggrieved against the orders passed by the Adjudicating Authority has filed these three Appeal(s).

4. In these Appeal(s), notices were issued by this Tribunal. In Company Appeal (AT) (Insolvency) No.180 of 2022 an interim order was passed on 23.02.2022 that Contempt Application No.01/2022 for non-compliance of order dated 07.12.2021 may not be proceeded any further.

5. In Company Appeal (AT) (Insolvency) Nos.629 and 630 of 2022 an interim order was passed on 01.06.2022 that in pursuance of direction issued in the impugned order approving the Resolution Plan, the Appellant shall not be obliged to transfer the leasehold land in favour of the

Successful Resolution Applicant. Against the interim order dated 01.06.2022 an Appeal was filed being Civil Appeal No.4748 of 2022 by Earth Towne Flat Buyers Welfare Association before the Hon'ble Supreme Court, which Appeal was dismissed on 14.07.2022.

6. We have heard Shri Krishnendu Datta, learned Senior Counsel appearing for Appellant with Shri Manish Kumar Srivastava and Shri U.N. Singh; Shri G.P. Madaan, learned Counsel appeared for RP. We have heard learned Counsel appearing for Successful Resolution Applicants in both the Appeals. We have also heard Shri Abhijeet Sinha, learned Counsel appearing for Earth Towne Flat Buyers Welfare Association. We have also heard other Counsel appearing for the other Respondent(s) and Interveners.

7. Before proceeding to notice the respective submissions of learned counsel for the parties, we may briefly note the case taken up by the Appellants, Respondents and Interveners in these Appeals.

Company Appeal (AT) (Ins.) No. 630 of 2022

8. The Appellant's case is that a registered Lease Deed dated 01.09.2010 was executed in favour of Earth Towne Infrastructure Pvt. Ltd. in respect of Plot No. GH- 04, Sector-01, Greater Noida admeasuring 73942.00 Sq. meter. The property was allotted in favour of a consortium comprising of Earth Infrastructures Limited as lead member and Raus Infra Ltd. and Shalini Holding Ltd. On the request of the consortium Special Purpose Company was created as per clause- C-8(e) of the

brochure of the scheme, namely “Earth Towne Infrastructure Pvt. Ltd.” in whose favour Lease Deed dated 01.09.2010 was executed. There was default on the part of the Lessee of payment of land premium, lease rent and other charges. Notices were issued on the Lessee on 04.04.2019, 01.05.2020, 29.01.2020 and 16.07.2019 demanding the outstanding dues. In the insolvency resolution process initiated against Earth Infrastructures Limited, by letter dated 18.09.2019 Appellant has communicated its dues against Earth Towne Infrastructure Pvt. Ltd. of Rs.148,37,46,148/-. The Resolution Professional was requested to inform the Appellant about the further proceedings, however, the Appellant did not receive any response from the Resolution Professional. After approval of the Resolution Plan by order dated 05.04.2021 for Earth Towne Project, Resolution Professional informed about the approval of Resolution Plan to the Appellant. The Appellant was never communicated about the application filed by the Resolution Professional being C.A. No.751/ND/2019 for approval of the Resolution Plan. After coming to know about the order, I.A. No. 96 of 2021 was filed by the Appellant before the Adjudicating Authority for recall of the order. The Adjudicating Authority has passed a further order dated 07.12.2021 for implementation of the plan which has already been challenged by the Appellant in Company Appeal (AT)(Ins.) No. 180 of 2022 on the ground that the Resolution Plan does not take any liability of the Appellant although it notices that the dues of the Appellant are there, the Resolution Plan also sought transfer of land in favour of the Successful Resolution Applicant, without payment of dues of the Appellant, the subject

property could not have been considered in CIRP of Corporate Debtor namely Earth Infrastructures Limited and that the approval of the Resolution Plan is illegal. Corporate Debtor is neither the Lease Holder nor has any right, title, or interest in the Subject Property. The Resolution Professional and the Resolution Applicant have shown complete bias and have suppressed and concealed the true and correct facts from the NCLT. As on 31.03.2022, Lessee i.e., Earth Towne Infrastructures Pvt. Ltd. is liable to pay an amount of Rs.215,87,18,190/-. The Resolution Plan is in clear disregard of the terms and conditions of the Lease Deed. The Adjudicating Authority has granted certain waiver in Para 15 in utter disregard of the law. The order passed by the Adjudicating Authority dated 05.04.2021 is also in violation of the principles of natural justice since neither any notice was received from the Adjudicating Authority at the time of approval of the Resolution Plan nor Resolution Professional informed about the Resolution Plans. The CoC is not competent to consider and vote on the property which do not belong to the Corporate Debtor. The Development Agreement dated 09.09.2010 entered between the Corporate Debtor and the Lessee - Earth Towne, being an unregistered document cannot be enforced against the Appellant which was not party to the Development Agreement. The Appellant could not have been directed to transfer the lease hold rights. No consent or approval was taken from the Appellant for transfer of lease hold right in favour of the Successful Resolution Applicant.

9. A reply has been filed by the Resolution Professional, Respondent No.1. The Resolution Professional in his reply pleaded that the Lease Deed in favour of Earth Towne was executed by the Appellant on 01.09.2010 on the request of consortium members with lead member being Earth Infrastructure Ltd. The lead member had 78% of shareholding which later increased to 98%. On the insolvency commencement date the lead member held 98% shares of the Lessee namely Earth Towne Infrastructures Pvt. Ltd. The registration money, allotment money and instalment of premium had been paid by the Corporate Debtor. The paid up capital of Earth Towne Infrastructures Pvt. Ltd. is only Rupees one lakh. Till date Rs.51.88 crores have been paid by the Corporate Debtor to the Appellant against the Lease Deed dated 01.09.2010. The Appellant was fully aware that the project on the subject land is being executed by the Corporate Debtor which is clear by the letter written by the Appellant dated 11.05.2015 to Senior Police Superintendent of District Gautam Budh Nagar, where Appellant has mentioned that Earth Infrastructure Ltd. was engaged in construction work. The Earth Towne Infrastructure Pvt. Ltd. although has separate legal existence but it is completely dependent upon the Corporate Debtor. If the corporate veil is pierced, it is clear that Earth Towne is nothing but the alter ego of the Corporate Debtor. As per Development Agreement dated 09.09.2010, Earth Towne has transferred all development rights alongwith the marketing and selling rights with respect to the project developed over the subject land. The subsidiary company and the holding company has common directors and promoters. The subsidiary company has no

business of its own. The Adjudicating Authority was fully aware that the subject land belong to the Appellant. The status of the dues of the Appellant was disclosed by the Resolution Professional in its Information Memorandum. The pending dues of the Appellant of Rs.148,37,46,148/- were shared by Resolution Professional with the Resolution Applicants. The Appellant was aware of the CIRP proceeding since vide letter dated 28.05.2019 in respect of all the three projects namely Earth Tech-one, Earth Sapphire Court and Earth Towne, the Resolution Professional has asked for relevant information/documents from the Appellant. The Appellant on 18.09.2019 filed claim towards the dues of subsidiary of the Corporate Debtor namely Earth Towne of Rs.148,37,46,148/- against the lease deed dated 01.09.2010. The Appellant was, however, not vigilant to either follow up the matter or file application before the Adjudicating Authority for non-admission of its claim. The Resolution Plan refers to the dues of the Appellant and claims relief in terms of entire dues. The Approved Resolution Plan is binding on all stakeholders including the Appellant.

10. The Successful Resolution Applicant i.e. Roma Unicon Designex Consortium (Respondent No.2) after narrating the details of allotment and lease deed pleads that Special Purpose Company namely Earth Towne Infrastructure Pvt. Ltd., a wholly owned subsidiary of the Corporate Debtor, was formed after the allotment of land. The Earth Towne Infrastructure Pvt. Ltd. was incorporated for sole purpose of obtaining lease rights. Part consideration was paid by the Corporate Debtor including stamp duty. The

responsibility of project implementation and payment to the Appellant lies with the Corporate Debtor. As per the Development Agreement, the Corporate Debtor was responsible for construction activities and Earth Towne Infrastructure Pvt. Ltd. was entitled for 18% of the developed real estate units. Development Agreement does not require any registration. However, stamp duty of Rs.50/- was paid. The Builder Buyer Agreement was jointly signed by the Corporate Debtor and Earth Towne Infrastructure Pvt. Ltd. clearly stating the relationship and responsibilities between them. The building plan was placed by the Corporate Debtor before the Appellant who had assented to the same and gave sanction. In 2011, the Corporate Debtor started marketing and sale of units of project Earth Towne but was able to construct partially only 12 Towers of various sizes and units and foundation work of 5 towers was completed the year 2016. Appellant has written letter dated 11.05.2015 to the Police Authorities when facing problems, *inter alia*, informing that the Corporate Debtor is developing the project. The Appellant has filed a claim with the erstwhile Resolution Professional claiming outstanding dues. The CoC in its 14th meeting dated 26.08.2019 approved the plan of Roma Unicon Designex Consortium for the Earth Towne project. Appellant had filed a claim on 18.09.2019 of Rs.148,37,46,148/-. Appellant was fully aware of the CIRP. After approval of the plan erstwhile Resolution Professional sent letter dated 26.07.2021 to the Appellant informing that Resolution Plan having been approved the same is binding on the Appellant. Appellant was requested that it is required to transfer land in favour of the Successful Resolution Applicant

in pursuance of the order dated 05.04.2021. The Successful Resolution Applicant sent emails and letters to the Appellant to implement the Resolution Plan and transfer the subject land. Order dated 07.12.2021 has been issued by the Adjudicating Authority directing the Appellant to implement the plan which has not been complied so far.

11. A reply has also been filed by Respondent No.3 i.e. Earth Towne Flat Buyers Welfare Association through its Authorised Representative Shri Satyabrata Mitra. Respondent No.3 has been impleaded on an I.A. No. 2286 of 2022. Earth Towne Flat Buyers Welfare Association (hereinafter referred to as 'Association') in its reply after noticing the initial background facts has pleaded that the construction of project is not taking place since 2016. The Home/Flat Buyers have perspective that it is one company and same group that was developing the project. In response to the public announcement, the creditors of the Corporate Debtor filed their respective claims with regard to Earth Towne project. It has been submitted that Appellant has also filed a claim of Rs.148,37,46,148/- on account of dues of Earth Towne. Even though the claim is filed in the name of Earth Towne, the liability to pay the debt of the Appellant lies with the Corporate Debtor as the Corporate Debtor was responsible to arrange finance. It is submitted that there is irreparable loss incurred to the Home Buyers due to incompleteness of the project. The Home Buyers are suffering huge loss monthly. The Resolution Professional has admitted claims of 1878 unit holders amounting to Rs.438 crores. Since Home/Flat Buyers could not receive possession of their respective apartments, many of them are forced

to live in rental houses for the past 10 years which has caused an exponential burden on their financial, physical and mental health. It is submitted that members of the Earth Towne Flat Buyers Welfare Association had meeting with the Additional CEO of the Appellant on 28.06.2017, even before CIRP was initiated. Members of Respondent No.3 has expressed their resentment about the non-fulfilment of obligations by the Appellant towards the project Earth Towne but Appellant never took any step to recover their dues. It is further submitted that in the meeting the Additional CEO of GNIDA confirmed that they will recalculate the principal and interest and check whether they can waive the penal interest from 2016 onwards till date and approach the new developer for out of court settlement. It is also pleaded that Appeal filed by the Appellant is barred by time and that the conduct of the Appellant is against the objective of I&B Code. Further, the Resolution Plan once approved is binding on the Appellant. With regard to dues of the Appellant, Resolution Plan seeks waiver from the liability of the Appellant, which has been granted by the Adjudicating Authority on 05.04.2021. The commercial wisdom of CoC cannot be judicially reviewed. The claim of the Appellant stands extinguished after approval of the Resolution Plan.

12. A reply has also been filed by the Authorised Representative of homebuyers in class through Shri Gulshan Gaba, Authorised Representative submitting that the plan having been approved, the role of Authorised Representative has come to an end.

Company Appeal (AT) (Ins.) No. 629 of 2022

13. As noted above, this Appeal has been filed challenging order dated 08.06.2021 by which order the Adjudicating Authority has approved the Resolution Plan submitted by M/s Alfa Corp Development Pvt. Ltd. with regard to two projects namely Earth Sapphire Court and Earth Tech-one. Property of the Appellant i.e. Plot No. TZ-01, Sector-Tech Zone, area situated in Greater Noida, Gautam Buddh Nagar admeasuring 58866.03 Sq. meter was leased to Neo Multimedia Ltd. and another property being Plot No. 48, Sector- Knowledge Park No. 05, area situated in Greater Noida, Gautam Budh Nagar admeasuring 20911.24 Sq. meter, was leased to Nishtha Software Pvt. Ltd. by registered Lease Deed dated 01.09.2010. The Development Agreements were entered with the Lessee of the aforesaid land who were 100% subsidiary of the Corporate Debtor. The Map Sanction/Layout Plan was applied by the Lessee which was approved by the Appellant. The Appellant's case is that the Development Agreement dated 25.04.2011 and 20.02.2010 respectively are illegal and non-est and not enforceable against the Appellant. The property which was leased out to the Lessee have been dealt with in the Resolution Plan submitted by M/s Alfa Corp Development Pvt. Ltd. On default being committed in payment of land premium and lease rent default notices were served dated 09.01.2019 on Nishtha Software Pvt. Ltd. The default notice dated 09.01.2019 was also issued on Neo Multimedia Pvt. Ltd. Several notices to both the Lessees were issued thereafter. As on 24.03.2022, Neo Multimedia Pvt. Ltd. is liable to pay an amount of Rs.19,76,10,064/- and as on 25.03.2022, Nishtha

Software Pvt. Ltd. is liable to pay an amount of Rs.11,15,15,009/-. Further, amount towards lease rent and towards additional compensation is payable by the lessee. The CoC of the Corporate Debtor had no power and jurisdiction to deal with the Lessee's property. The properties which were leased out to Neo Multimedia Pvt. Ltd. and Nishtha Software Pvt. Ltd. could not have been considered in CIRP of the Corporate Debtor namely Earth Infrastructure Ltd. which is A completely separate legal entity. Under the terms of the Lease Deed, no permission has ever been granted to transfer the leased land. The Subsidiary company, which was land holding company was a separate legal entity and the leased land cannot be held to belong to the Corporate Debtor in any manner. The Adjudicating Authority failed to appreciate that immovable property of the third party cannot be considered as property of Corporate Debtor. The Adjudicating Authority erred in noting that the waiver sought were within the purview of I&B Code. The impugned order was passed in violation of the principles of natural justice and no notice was issued to the Appellant, when the application was filed for approval of the Resolution Plan. The Resolution Professional has given incorrect compliance certificate to the Adjudicating Authority ignoring the provisions of the I&B Code. No direction can be issued to bind Appellant for future dues including lease rent. The Adjudicating Authority failed to consider that the Lessees are not in insolvency and they are not the Corporate Debtor. The Adjudicating Authority erred in issuing direction to transfer the land in favour of the

Successful Resolution Applicant. Resolution Plan seeks rewriting of terms and conditions of Lease Deed.

14. Reply has been filed by the Respondent No.1 – Resolution Professional which reply contains the similar pleadings as has been made by the Resolution Professional in Company Appeal (AT) (Ins) No. 630 of 2022, hence, need no repetition. It is further pleaded the M/s Nishtha Software Pvt. Ltd. and M/s Neo Multimedia Pvt. Ltd. are wholly owned subsidiaries of the Corporate Debtor. Development rights for project Earth Sapphire Court and Earth Tech-one are held by the Corporate Debtor under the MOU dated 20.02.2010 and 25.04.2011. As per the MOU, the Corporate Debtor has right to use the land. The payment in terms of the Lease Deed has paid solely from the resources of the Corporate Debtor. The paid up capital of Nishtha Software Pvt. Ltd. is only Rs.2 Lakhs. Appellant was fully aware that the Corporate Debtor is the developer of the aforesaid land. The Adjudicating Authority was fully aware about the dues of Greater Noida. One of the Resolution Applicants Om Drishain International Pvt. Ltd. filed an application CA 818/2019 in CP(IB) No. 401/2017 for consideration of his Resolution Plan. On their application, the Adjudicating Authority directed the Resolution Professional to make a comparative chart. Comparative Chart was submitted by the Resolution Professional before the Adjudicating Authority. In Point No. 15.6, treatment of dues of Appellant was dealt with. In the Information Memorandum, the dues of the Appellant were mentioned. The Appellant was well aware of the initiation of CIRP against the Corporate Debtor.

Resolution Plan refers to the dues of the Appellant and seeks waiver from payment of the dues.

15. Reply has also been filed by Alpha Corp Development Pvt. Ltd. – Successful Resolution Applicant (Respondent No.2). In the reply filed by the Successful Resolution Applicant, all relevant documents including the Information Memorandum has been brought on record. The Successful Resolution Applicant has given details of the project, name of the land owning company with regard to projects Earth Sapphire Court and Earth Tech-one. The land owning companies are wholly owned subsidiary companies of the Corporate Debtor. After decision of the CoC in 8th meeting held on 20.05.2019 inviting project-wise resolution plans, the Respondent No.2 submitted plan for both the projects viz. Earth Sapphire Court and Earth Tech-one. The Resolution Plan was submitted by the Successful Resolution Applicant on 16.09.2019 and thereafter it submitted a revised Resolution Plan on 15.10.2019. The plan was circulated to the CoC on 18.10.2019 and in the 19th CoC meeting held on 11.11.2019, the plan was approved with 99.97% vote share. I.A. No. 05/2020 was filed by the Resolution Professional for approval of the Resolution Plan which has been allowed by order dated 08.06.2021 approving the Resolution Plan. The Appellant filed their claims at much belated stage on 11.11.2021. Appellant cannot take advantage of their own lapse and Appellant was well aware of the CIRP proceeding against the Corporate Debtor. The Corporate Debtor has obtained various no objection certificates and requisite permission from Directorate of Environment, Uttar Pradesh in order to

commence the project. No objection certificate was issued by the authority in October, 2013. The Successful Resolution Applicant has submitted Resolution Plan on the basis of information contained in the Information Memorandum dated 21.06.2019. The land holding companies are wholly owned subsidiary companies of the Corporate Debtor and land holding companies and the Corporate Debtor are single economic entity. The land owning companies and the Corporate Debtor are separate legal entities, holds no merit. Projects Earth Sapphire Court and Earth Tech-one were in essence leased by the Appellant to the Corporate Debtor. M/s Nishtha Software Pvt. Ltd. and M/s Neo Multimedia Pvt. Ltd. were special purpose vehicles created to avoid liabilities in an event of default.

16. I.A. No. 4533/2022 has been filed in Company Appeal (AT) (Ins.) No. 629 of 2022 by Earth Techone Patrons Independent Association and Sapphire Patrons Independent Common Association claiming to be duly registered association of both the projects. Applicants have been permitted to intervene in the Appeal. Applicant's case is that project Earth Sapphire Court was launched in the year 2010 by the Corporate Debtor while Earth Tech-one was launched in the year 2012. After launching the projects the Corporate Debtor started collecting money for these projects. The Corporate Debtor had launched both the projects under the scheme of 12% assured return and in most of the cases the assured return was paid to all the investors till September 2015. After September 2015, the Corporate Debtor stopped paying return on investment to the investors. A builder buyer meeting was held on 20.05.2016 which was attended by two

directors of the Corporate Debtor and almost 100 buyers of different projects, where the CEO of the GNIDA gave warning for action against the Corporate Debtor in case it does not resolve the grievances of the investors. A complaint was filed to Economic Offences Wing, Delhi Police and after preliminary investigation FIR No.43/2016, 111/2016, 112/2016 & 113/2016 were registered against the Corporate Debtor and its officials. The investors gave a representation on 27.07.2016 to the Appellant praying to take strict action against the Corporate Debtor. Investor also met with CEO of the Appellant. Meeting was also held on 08.05.2017 and 16.05.2017. The Appellant did not take any action against the Corporate Debtor and thereafter on 06.06.2018 CIRP was initiated against the Corporate Debtor. On 11.11.2019, the plan submitted by Alfa Corp Development Pvt. Ltd. was approved by the CoC. The Appellant had many opportunities to work towards solution and revival of the project as well as it has authority to take any action against the Corporate Debtor but it did not take any action. A timely action could revive the project and save the hard earned money of real estate buyers. Presently, when the Successful Resolution Applicant is ready to revive the struk projects of the Corporate Debtor, the Appellant is creating hurdles by filing this appeal. The Applicants have alternatively prayed that Appellant be directed to transfer the respective projects in the name of respective homebuyers' association as per the provisions of The Real Estate (Regulation and Development) Act, 2016.

17. Shri Krishnendu Datta, learned Senior Counsel appearing for the Appellant contends that it was the Appellant who was owner of the lease lands, and leases were granted to respective Special Purpose Company, i.e., Earth Towne Infrastructures Ltd.; Nishtha Software Pvt. Ltd. and Neo Multimedia Pvt. Ltd., for which Special Purpose Company was formed as per the terms and conditions of the Allotment Letter, who were to develop the leased land and were liable to pay all dues to the Appellant. It is submitted that CIRP was initiated only against Earth Infrastructures Ltd., which was the owner of the subsidiary company. The Resolution Plan with regard to Earth Towne, Sapphire Court and Earth Techone Projects were approved and dues of the Appellant were completely denied. Although, the Appellant has sent a letter dated 18.09.2019 to the RP about the dues of the Appellant towards subsidiary of the Corporate Debtor namely – Earth Towne Infrastructures Ltd. for Rs.148,37,46,148/-, but CIRP being not against subsidiary company, the dues were not taken note of by the RP. The lands which were leased by the Appellant to the land-owning Company, could not have been made part of the assets of the Corporate Debtor. The Corporate Debtor had neither ownership nor even lease hold rights in the said land. The subject lands have been dealt in the Resolution Plan with a clause requiring the Appellant to transfer the land in the name of the Successful Resolution Applicant, without taking care of the dues of the Appellant. The Corporate Debtor and the Successful Resolution Applicant had dealt with land of the Appellant regarding which they have no jurisdiction. The Resolution Plan adopts a very novel method of taking

away the land of the Appellant and denying its dues, which are owned by lessee on the land leased to it. Against the Earth Towne, the dues of the Appellant is about Rs.200 crores. The dues payable to a Public Authority, which is performing public functions cannot be allowed to be negated in the manner as has been done in the Resolution Plan. The RP has not discharged his duties in accordance with the provisions of the Code while giving a certificate that Resolution Plan complies with the provisions of the Code. The Resolution Plan could not have dealt with the land of the Appellant, which was not asset of the Corporate Debtor and only assets of the Corporate Debtor can be made subject in the Resolution Plan. The Adjudicating Authority also failed to apply its mind and ignored the vital fact while approving the Resolution Plan. The mere fact that Corporate Debtor has written certain letters to the Appellant containing information about the Project, does not in any manner mean that Appellant was aware of the nefarious manner in which the Appellant's land was sought to be dealt with by the Corporate Debtor and the Resolution Applicants. The Resolution Plan deserves to be rejected. The transfer of land of the Appellant in favour of any other entity requires prior approval of the Appellant. The Information Memorandum, which was prepared by RP did not mention that lease lands were owned by Corporate Debtor or that lease hold rights were owned by the Corporate Debtor. The lease lands are valuable lands. Had the lease land been part of the Corporate Debtor asset, the value of the assets of the Corporate Debtor would have increased manifold.

18. Shri Krinshnendu Datta, learned Senior Counsel for the Appellant further submits that the Development Agreement entered between Earth Towne Infrastructure Pvt. Ltd. and the Corporate Debtor is an unregistered document which cannot affect rights of the Appellant. The said Development Agreement was not brought into notice of the Appellant. Default notices were issued to the Lessee i.e. Earth Towne claiming payment of outstanding dues. Default notice was issued on 04.04.2019 and thereafter. The shareholder of company does not own the assets of the company. The Corporate Debtor being the majority shareholder of the Earth Towne Infrastructure Pvt. Ltd. cannot claim ownership of the project Earth Towne. The Resolution Plan modifies the Lease Deed dated 01.09.2010 which is impermissible. The plan violates provisions of Section 38(2)(e) of the I&B Code. The Resolution Professional has not discharged its duties and responsibilities under the I&B Code while certifying that the plans submitted by Roma Uicon Designex Consortium and Alfa Corp Development Pvt. Ltd. are compliant of the I&B Code. The Resolution Professional in the Information Memorandum as prepared in June, 2019 has disclosed the assets of the Corporate Debtor. Details of five projects were separately included. In the Information Memorandum it is stated that the Corporate Debtor has development and selling rights of five projects and land is allotted to different land owning companies which are the subsidiaries of Earth Infrastructure Ltd. With regard to project Earth Towne, the name of land owning company in the Information Memorandum was wrongly mentioned as Earth Infrastructures Limited, Raus Infra Ltd.

and Shalini Holding Ltd. whereas they were members of the consortium in whose favour land was allotted but by virtue of Lease Deed executed dated 01.09.2010 and the land owning company was "Earth Towne Infrastructure Pvt. Ltd."

19. The Learned Counsel for the Resolution Professional, Mr. G. P. Madaan refuting the submissions of learned counsel for the Appellant submits that the Resolution Professional in the Information Memorandum has given all the details regarding the land owning companies and the details of the developer who has development and selling rights over the five projects. It is submitted that the Information Memorandum has also given details of the claim which was received from the Appellant. The Resolution Professional has also shared the letter of its dues of Rs.148,37,46,148/- received from the Appellant claiming to be dues of Earth Towne. It is submitted that it was the Corporate Debtor which was making all payments against the Lease Deed dated 01.09.2010 and Earth Towne was nothing but alter ego of Corporate Debtor. Appellant was not vigilant of its claim. Appellant was well aware of the insolvency process which was initiated against the Corporate Debtor. The Successful Resolution Applicant had sought relief in respect of dues of the Appellant which was accepted by the Adjudicating Authority. The Resolution Plan Para 4.1.6 refers to dues of GNIDA and Para 18.2 refers to reliefs claimed by Resolution Applicant were mentioned. Resolution Plan is binding on the Appellant.

20. We have heard Shri Abhishek Anand and Mr. Sandeep Bhuraria, learned counsels appearing for Successful Resolution Applicant. Shri Abhishek Anand, learned counsel appearing for Roma Unicon Designex Consortium submitted that the land does not belong to Greater Noida but it belong to the Investors. The Appellant's land's premium amount is fully paid and the payment which is now being sought to be raised by the Greater Noida is payment for penalty and interest and not of the land premium. The Lessee has right to sell as per MOU entered between the Corporate Debtor and the land holding company i.e. Earth Towne. The Corporate Debtor was responsible to pay the financial cost of the leased land and arrange capital for construction of the proposed project. It was with the consent of the Appellant that all the projects were registered with Uttar Pradesh Real Estate Regulatory Authority in the name of the Corporate Debtor. The CoC on 26.08.2019, after considering all aspects of the matter approved the Resolution Plan submitted by Roma Unicon Designex Consortium. The claim which was sent by the Appellant to the Resolution Professional was after approval of the Resolution Plan. The Appellant was fully aware of the CIRP against the Corporate Debtor. The Resolution Professional after considering the various clauses of the Resolution Plan has certified that the said plan conforms to the provisions of the I&B Code.

21. The Learned counsel for the Successful Resolution Applicant appearing on behalf of Alfa Corp Development Pvt. Ltd. submits that the Greater Noida has full knowledge of the Lease Deeds dated 04.02.2008 and

01.09.2010 and the development agreements. Under the Lease Deed, the Lessee has right to sell. The Learned counsel further submits that under the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, No. 16/2010, the allottees have become owners of the apartments. In the Resolution Plan submitted by Alfa Corp with regard to projects Earth Sapphire Court and Earth Tech-One, Resolution Plan contemplated for waiver of dues of the GNIDA on the land holding companies and in event, the dues are not waived, the Financial Creditors had undertaken to bear the dues. It is submitted that in view of the aforesaid clause in the Resolution Plan, order approving the Resolution Plan need to be approved in this Appeal. It is submitted that the Resolution Applicant has undertaken to carry on the construction and deliver the flats to the home buyers within a period of five years. The land on which Project Earth TechOne and Earth Sapphire Court of the Corporate Debtor was being developed, is leased by the Appellant in favour of the wholly owned subsidiary companies of the Corporate Debtor, namely M/s Neo Multimedia Limited and M/s Nishta Software Private Limited respectively.

22. Shri Abhijeet Sinha, learned counsel appearing for Earth Towne Flat Buyers Welfare Association submitted that property as defined under Section 3(27) of the Code is very wide definition. The statute does not exclude development rights from the definition of property. It is submitted that initially allotment of land by the Appellant was in favour of the Consortium of which Corporate Debtor is the lead member. Corporate Debtor has 98% shareholding of the Earth Towne Infrastructure Pvt. Ltd.

Learned counsel submitted that the Appellant was well aware that Earth Infrastructure Ltd. is developing the land and is the developer carrying out the construction. Learned counsel has referred to letter written by the Appellant to Police Authorities in the year 2015 when the letter was sent by the developer – Corporate Debtor to the Greater Noida when construction was being interfered with by certain miscreants. It is submitted that the flat owners had time and again approached the Appellant, praying to intervene in the matter and ensure that construction of project goes on. It is further submitted that it was understanding of the flat buyers that Earth Infrastructure Ltd. and Earth Towne Infrastructure Pvt. Ltd. are one and the same. Learned counsel has also referred to letter dated 28.06.2017 of the Flat Buyers Welfare Association. It is submitted that the lease hold right and development right can be transferred. The allotment made in favour of the flat buyers cannot be taken away nor can Resolution Plan be modified.

23. Learned counsel appearing for Applicants in I.A. No. 4533/2022 submits that the Resolution Plan with regard to projects Earth Sapphire Court and Earth Tech-One are different, where in event the payment of Appellant are not waived, the allottees themselves have offered to clear the dues. It is submitted that the Applicants have brought into the notice of the Appellant about the default of the builders i.e. Corporate Debtor and meetings were held with the Appellant on 08.05.2017 and 16.05.2017. Complaints were also filed by the flat buyers before the Economic Offences Wing, Delhi Police where investigation is going on. When the Resolution

Applicant is ready to revive the stuck project, the Appellant should not cause hurdle in revival of the project. Learned counsel has alternatively submitted that powers under Section 8 of The Real Estate (Regulation and Development) Act, 2016 may be invoked and the home buyers may be permitted to develop the project.

24. We have considered the submissions of learned Counsel for the parties and have perused the records.

25. Before we enter into respective submissions of learned Counsels for the parties, we need to notice the relevant Clauses of the Allotment Letter and the Lease Deed dated 01.09.2010 to appreciate the nature of rights created by the said transactions. The Appellant issued Allotment Letter dated 19.03.2010 to Consortium, consisting of one M/s. Earth Infrastructures Limited – Lead Member; M/s Raus Infrastructure and M/s Shalini Holdings Ltd. for Builders Residential/ Large Group Housing Plot No.GH-04, Sector 01, Greater Noida, Uttar Pradesh with area of 73900 sq. mtrs. The allotment was on quoted rate of Rs.10050/- per sq. mtrs. The letter contained the detailed payment plan of the balance premium instalments. A letter dated 22.07.2010 was written by Earth Infrastructures Ltd. to the Appellant that as per Clause 8(e) of Application Form, a Special Purpose Company (SPC) “Earth Towne Infrastructure Pvt. Ltd.” was formed for the purpose of getting Lease Deed executed and registered in favour of Earth Towne Infrastructure Pvt. Ltd. The Appellant approving the request of M/s Earth Infrastructures Ltd. executed the Lease Deed in favour of M/s Earth Towne Infrastructure Pvt. Ltd. to develop and

market the Project on demarcated Plot. The Lease Deed dated 01.09.2010 contained following statement – “... AND WHEREAS the Lessor approved the name and status of M/s Earth Towne Infrastructures Pvt. Ltd. on the request of consortium members (as mentioned above) in accordance with the clause= C-8(e) of the brochure of the scheme, to develop and market the project on demarcated plot No.GH-04, Sector-01, GREATER NOIDA measuring 73942.00 sq. mtrs.”. The Lease Deed further contained a statement that Special Purpose Company comprising of – (1) M/s Earth Infrastructures Ltd., 78% shareholding, Lead Member; (2) M/s Raus Infrast Ltd., 11%, Relevant Member; and (3) M/s Shalini Holdings Ltd., 11%, Relevant Member. The Lease Deed further contemplated that M/s Earth Infrastructure shall always remain the Lead member of the Special Purpose Company, whose shareholding in the Special Purpose Company shall remain unchanged till the occupancy/ completion certificate of at least one phase of the project is obtained from the Lessor (Authority). The Lease Deed further noted that total premium was Rs.74,26,95,000.00 out of which 10% premium have been paid by the Lessee to the Lessor. The balance premium was to be paid in 16 half-yearly instalments. In case of default in depositing the instalments interest @ 15% compounded half yearly shall be leviable for defaulted period on the defaulted amount. The Lease Deed further contemplated that Lessee has to pay lease rent equivalent to 11 years @ 1% of the premium of the plot as “One Time Lease Rent” phasewise before getting permission to execute Tripartite Sub-Lease

Deed in favour of their prospective buyers. The following is the provision in the Lease Deed with regard to yearly lease rent:

*{ii) AND THE LESSEE DOTH HEREBY DECLARE AND
CONVENANTS WITH THE LESSOR IN THE
MANNER FOLLOWING:*

a) Yielding and paying therefore yearly in advance during the said term unto the Lessor yearly lease rent indicated below:-

- (i) Lessee has paid Rs.74,31,171/- (Rs. Seventy Four Lac Thirty One Thousand One Hundred Seventy One only) as annual lease rent being 1% of the plot premium for the first 10 years of lease period.*
- (ii) The lease rent may be enhanced by 50% after every 10 years i.e. 1.5 times of the prevailing lease rent.*
- (iii) The lease rent shall be payable in advance every year. First such payment shall fall due on the date of execution of lease deed and thereafter, every year, on or before the last date of previous financial year.*
- (iv) Delay in payment of the advance lease rent will be subject to interest @15% per annum compounded half yearly on the defaulted amount for the defaulted period.*
- (v) The Lessee has to pay lease rent equivalent to 11 years @ 1% of the premium of the plot as "One Time Lease Rent" phasewise before getting permission to execute Tripartite Sub-Lease Deed in favour of their prospective byers unless the Lessor decided to withdraw this*

facility. On payment of One Time Lease Rent, no further annual lease rent would be required to be paid for the balance lease period. This option may be exercised at any time during the lease period, provided the Lessee has paid the earlier lease rent due and lease rent already paid will not be considered in One Time Lease Rent option.

- b) *The Lessee shall be liable to pay all rates, taxes, charges and assessment leviable by whatever name called for every description in respect of the plot of land or building constructed thereon assessed or imposed from time to time by the Lessor or any Authority/ Government. In exceptional circumstances the time of deposit for the payment due may be extended by the Lessor. But in such case of extension of time an interest @ 15% p.a. compounded every half yearly shall be charged for the defaulted amount for such delayed period. In case Lessee fails to pay the above charges it would be obligatory on the part of its members/ sub Lessee to pay proportional charges for the allotted areas.*
- c) *The Lessee shall use the allotted plot for construction of Group Housing/ flats/ plots. However, the Lessee shall be entitled to allot the dwelling units on sublease basis to its allottee and also provide space for facilities like Roads, Parks etc. as per their requirements, convenience with the allotted plot, fulfilling requirements or building bye-laws and prevailing and under mentioned terms and conditions to the Lessor. Further transfer/ sub lease shall be governed by the transfer policy of the Lessor.*

- (i) *Such allottee/ sub Lessee should be citizen of India and competent to contract.*
- (ii) *Husband/ wife and their dependent children will not be separately eligible for the purpose of allotment and shall be treated as single entity.*
- (iii) *Normally, the permission for part transfer of plot shall not be granted under any circumstances. The Lessee shall not be entitled to complete transaction for sale, transfer, assign or other wise part with possession of the whole or any part of the building constructed thereon before making payment according to the schedule specified in the lease deed of the plot to the Lessor. However, after making payment of the premium of the plot to the Lessor as per schedule specified in the lease deed, permission for transfer of built up flats or to part with possession of the whole or any part of the building constructed on the Group Housing Plot, shall be granted and subject to payment of transfer charges as per policy prevailing at the time of granting such permission of transfer. However, the Lessor, reserves the right to reject any transfer application without assigning any reason. The Lessee will also be required to pay transfer charges as per the policy prevailing at the time of such permission of transfer.*
The permission to transfer the part of the built up space will be granted subject to execution of tripartite sub-lease deed which shall be executed in a form and format as prescribed by



the Lessor. On the fulfillment of the following conditions:-“

26. Further, according to the Lease Deed, every transfer done by the Lessee shall have to be registered before the physical possession of the flat/ plot is handed over. The Lease Deed further contemplated that the first sale/ transfer of flat/ plot to an allottee shall be through a Sub-lease/ Lease Deed to be executed on the request of the Lessee to the Lessor in writing.

27. The Lease Deed executed in favour of Neo Multimedia Ltd. and Nishtha Software Pvt. Ltd. also contained the similar terms and conditions, which are not being repeated. After the execution of the Lease Deed, the Corporate Debtor entered into a Development Agreement with Earth Towne dated 09.09.2010. The Development Agreement was an unregistered document executed on a stamp paper of Rs.50. In the Agreement, First Party was Earth Towne Infrastructures Pvt. Ltd. and Second Party was Earth Infrastructures Ltd. It is useful to extract Clauses D, E and F of the Development Agreement, which are to the following effect:

“D. The First Party is suitably authorised to develop, construct market and sale/ sub-lease the said scheduled Land.

E. The Second Party is engaged in the business of; inter alia, development and construction of real estate projects.

F. The Second Party has approached the First Party and has expressed its willingness to develop the said Scheduled Land. Further, A Memorandum of

Understanding (MOU) dated 22.07.2010, had been executed between the parties in this regard. Whereby, the First Party has agreed to acquire/buy Scheduled Land and the Second Party has agreed to give "financial support"/loan to the First Party for acquiring /buying Scheduled Land and in Lieu, the same the Second Party shall have Development Right on the Scheduled Land."

28. The Corporate Debtor – Earth Infrastructures Ltd., after the execution of the Lease Deed proceeded to advertise the three projects namely – Earth Towne, Earth Sapphire Court and Earth Techone. The construction of the projects were stopped with effect from 2016. The CIRP was initiated against the Corporate Debtor by an order of the Adjudicating Authority dated 06.06.2018. After initiation of CIRP, Information Memorandum was prepared by the Resolution Professional Shri Akash Singhal in June 2019. We need to notice certain details given in Information Memorandum. Details of the assets and liabilities was contained in Annexure-A to Part-B. After referring to Un-audited Balance Sheet from 1st April, 2017 to 24 March, 2018, following was stated in the Information Memorandum:

"Besides the above, the Corporate Debtor has development and selling rights of five projects. The land of these projects belongs to different land owning companies which are the subsidiary companies of EIL. Details of the projects are as under:"

29. We in these Appeal(s) are concerned with the Projects of Earth Towne, Earth Sapphire Court and Earth Techone. It is useful to extract the certain information contained in a tabular form in the Information Memorandum with regard to Earth Sapphire Court, Earth Techone and Earth Towne, which is to the following effect:

"2) Earth Sapphire Court

S. No.	Particulars	Remarks
1.	Name of Land Owner	M/s Nishta Software Private Limited
2.	Name of Developer	M/s Earth Infrastructure Limited
3.	Source Documents	Lease Deed dated 01.09.2009 & Memorandum of understanding Dt. 20/02/2010 between M/s Nishta Software Pvt. Ltd. & M/s Earth Infrastructure Limited
4.	Brief description of property	Under Construction Property (Land & Building), For IT/ ITES
5.	Location	Plot No. 48, Sector Knowledge Park-5, Greater Noida, Sector 3, UP
6.	Is property situated in residential/ Commercial/ Mixed area or Industrial Area	Industrial Area for IT/ITES Activity
7.	Land Area	20911.24 Sq. Mts
8.	Is the property free hold or lease hold	Lease hold
9.	Name of the lessor/ lessee, nature of lease, date of commencement, termination of lease	Lessor : Greater Noida Industrial Development Authority (GNIDA) Lease Date : 01/09/2009 Time Period : 90 years
10.	Annual Lease Rent to be paid yearly	Rs.10,39,623.00

The subject property is under constructed with Basement 2 Nos, Ground Floor + 16 floor building structure on industrial plot for development of IT. ITES services of

20911.24 sq. mts. With a total built up area of 73480.30 sq. mts approx.

The neighbourhood of the subject property is Institutional Land/ Industrial land / Residential Land. Institutes like NIIMS, Millineaum School are in vicinity

Statement of Built up Area

S. No.	Floor	Built up Area as recorded (approx.. in sq. mt.)
(A).	Basement 1	12613.0
2.	Basement 2	12077.0
3.	Ground Floor	6428.6
4.	First Floor	6428.6
5.	Second Floor	6428.6
6.	Third Floor	6428.6
7.	Fourth Floor	6428.6
8.	Fifth Floor	3494.0
9.	Sixth Floor	3218.0
10.	Seventh Floor	1514.0
11.	Eight Floor	945.7
12.	Ninth Floor	945.7
13.	Tenth Floor	945.7
14.	Eleventh Floor	945.7
15.	Twelfth Floor	945.7
16.	Thirteenth Floor	945.7
17.	Fourteenth Floor	945.7
18.	Fifteenth Floor	945.7
19.	Sixteenth Floor	945.7
	Total Built up Area	73480.30 sq. mts. Approx.

Present Condition of Buildings

Structure work is completed; Brick work is done on some floors. In some floors brick work has been dismantled. Flooring is there in some parts of the building. Plaster on some floors has also been done. In some parts Glass Glazing has been done on the façade.

3) Earth Tech One

S.	Particulars	Remarks
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No.		
1.	Name of Land Owner	M/s Neo Multimedia Limited
2.	Name of Developer	M/s Earth Infrastructure Limited
3.	Source Documents	Development agreement dated 25.04.2011 between M/s Neo Multimedia Ltd. & M/s Earth Infrastructure Ltd.
4.	Brief description of property	Under Construction Property (Land & Building), Mixed land use
5.	Location	TZ-01, Sector Tech Zone, Greater Noida, Gautam Budh Nagar, Yamuna Express Way, UP
6.	Is property situated in residential/ Commercial/ Mixed area or Industrial Area	Institutional/ Industrial Area
7.	Land Area	58866.30 Sq. Mts.
8.	Is the property free hold or lease hold	Lease hold
9.	Name of the lessor/ lessee, nature of lease, date of commencement, termination of lease	Lessor : Greater Noida Industrial Development Authority (GNIDA) Lease Date : 04/02/2008 Time Period : 90 years
10.	Annual Lease Rent to be paid yearly	Not known

The subject property is under constructed having mixed land use comprising of commercial, IT/ ITES and residential blocks. Total Area of the plot is 58866.3 sq. mts. or 14.54 Acres with a total built up area of approximately 87971.0 sq. mts. The property comes under Greater Noida Industrial Development Authority. The shape of the property is Triangular.

The neighbourhood of the subject property is Institutional Land/ Industrial land. On one side of plot is NIIT Technologies which is operational.

Statement of Built up Area

Tower	No. of Floors	Ht. of Floors	Built up Area as recorded
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			(approx. in sq. mt.)
G1	B+g11	Basement 17ft/ 5.18 mt. Ground 16ft/4.87 mt Other Floors - 12ft/ 3.65 mts.	13190.0
G2	B+G+10	Basement 17ft/ 5.18 mt. Ground 16ft/4.87 mt Other Floors - 12ft/ 3.65 mts.	12610.0
G3	B+G+9	Basement 17ft/ 5.18 mt. Ground 16ft/4.87 mt Other Floors - 12ft/ 3.65 mts	11900.0
G4.	B+G+7	Basement 17ft/ 5.18 mt. Ground 16ft/4.87 mt Other Floors - 12ft/ 3.65 mts.	13520.0
G5.	B+G+10	Basement 17ft/ 5.18 mt. Ground 16ft/4.87 mt Other Floors - 12ft/ 3.65 mts.	14175.0
G6.	Basement only	Basement 17ft/ 5.18 mt.	1155.0
Residential A1	B+G+11	Basement 17ft/ 5.18 mt. Other Floors - 10ft/ 3.0 mts.	8560.0
Residential A2	B+G+9	Basement 17ft/ 5.18 mt. Other Floors - 10ft/ 3.0 mts.	5036.0
Residential A3	B+G+11	Basement 17ft/ 5.18 mt. Other Floors - 10ft/ 3.0 mts	7825.0
		Total Built up Area	87971.0 sq. mts. approx

Present Condition of Buildings

Structure of the above mentioned blocks completed. Some of the block like Residential blocks have brick work done in some portions and in some buildings Ground Floors is also having partition walls done but mostly structures are bare. The access to some blocks like Residential is not developed. No finishing works in any of the blocks.

4) Earth Towne

S. No.	Particulars	Remarks
1.	Name of Land Owner	M/s Earth Infrastructure Ltd M/s Raus Infrs Limited M/s Shalini Holdings Limited
2.	Name of Developer	M/s Earth Infrastructure Limited
3.	Source Documents	Memorandum of understanding Dr. 12/02/2010 between M/s Earth Infrastructure Limited & M/s Raus Infrs Limited & M/s Shalini Holdings Limited
4.	Brief description of property	Under Construction Property (Land & Building), Group Housing Project
5.	Location	Plot no.4, Sector no.1, Greater Noida
6.	Is property situated in residential/ Commercial/ Mixed area or Industrial Area	Residential Area
7.	Land Area	73492.00 sq. Mts.
8.	Is the property free hold or lease hold	Lease hold
9.	Name of the lessor/ lessee, nature of lease, date of commencement, termination of lease	Lessor : Greater Noida Industrial Development Authority (GNIDA) Lease Date : 01/09/2010 Time Period : 90 years
10.	Annual Lease Rent to be paid yearly	Not known

The Subject property is under construction having 16 unfinished towers out of which 5 towers are partly constructed till basement level on Group Housing Plot of 73942.0 sq. mts with a total built up area of 106671.0 sq. mts. The area comes under Greater Noida Industrial Development Authority. The neighbourhood of the subjected property is Group Housing Residential Apartments projects. Fully developed Group Housing Projects such as Steller Jeevan Apartments, Ace City, Velincia, Paramount Emotions, Arihant Arden are in vicinity. It's a new township developed by GNIDA.

Statement of Built up Area

Tower	No. of Floors	Ht. of Floors	Built up Area as recorded (approx. in sq. mt.)
T1	G/S+19	9'-6" or 2.925 mt	8020.0
T2	G/S+19	9'-6" or 2.925 mt	8020.0
T3	G/S+19	9'-6" or 2.925 mt	8020.0
T1+T2+T3 Combined Basement	Single Basement	15ft or 4.57 mts	2793.0
T4	G/S+17	9'-6" or 2.925 mt	5883.0
T5	G/S+19	9'-6" or 2.925 mt	6536.0
T6	G/S+19	9'-6" or 2.925 mt	7860.0
T7	G/S+19	9'-6" or 2.925 mt	6536.0
T8	G/S+19	9'-6" or 2.925 mt	6536.0
T9	G/S+19	9'-6" or 2.925 mt	6418.0
T4+T5+T6+T7+T8+T9 Combined Basement	Single Basement	15ft or 4.57 mts	4872.0
T10	2 Basement + G/s +2	Floor ht -9'-6" or 2.925 mt Basement Ht. 15ft or 4.57 mt	3124.0
T11	2 Basement + G/s +2	Floor ht -9'-6" or 2.925 mt Basement Ht. 15ft or 4.57 mt	2293.0
T12	2 Basement + G/s +2	9'-6" or 2.925 mt Basement Ht. 15ft or 4.57 mt	1245.0
T12A	Basement only	12ft or 3.65 mt	450.0
T25	G/S+19	9'-6" or 2.925 mt	8020.0
T26	G/S+19	9'-6" or 2.925 mt	8020.0
T27	G/S+19	9'-6" or 2.925 mt	8020.0
T25+T26+T27 Basement	Combined Basement	Ht. 15ft or 4.57 mt	2793.0
Tower T19 T20 T21 & T22	Combined Basement	Ht. 15ft or 4.57 mt	1212.0
		Total Built up Area	106671.0 sq. mts. approx

Present Condition of Buildings

The Subject property is under construction. Some blocks has been constructed till date. In Towers T1, T2, T3, T4,

T5, T6, T7, T8, T9, T25, T26, T27 structure is complete with Brick work and partition wall on some floors. In some towers it is still pending. T10, T11, T12, T12A, T19, T20, T21, T22 Bare Structure with columns and roof slab of some floors has been casted. No brick work. T19, T20, T21, T22 only part basement casted.”

30. The Information Memorandum, thus, clearly mentions that land of the above three Projects are leased land, leased by Greater Noida Industrial Development Authority and M/s Earth Infrastructure Limited is the developer.

31. We may also notice that the Appellant had issued notices demanding outstanding dues addressed to M/s Earth Towne Infrastructures Pvt. Ltd., which has been brought on record of the Appeal dated 04.04.2019, 01.05.2020, 29.01.2020 and 16.07.2019. The notice dated 04.04.2019 issued by the Appellant reads:

*“GREATER NOIDA INDUSTRIAL
DEVELOPMENT AUTHORITY*

*Administrative Office Plot No. 01, Sector Knowledge
Park-04, Greater Noida City,
District Gautambudh Nagar, UP*

Website: www.greaternoidaauthority.in

*Letter: G.N./Builders/2019/ 365
Dated: 4th April, 2019*

*Managing Director,
M/s. Earth Towne Infrastructures Pvt. Ltd.,
B-100, 2nd Floor, Naraina Industrial Area,
Phase-I, New Delhi - 110 028*

NOTICE BEFORE CANCELLATION

It is to inform that Greater Noida Industrial Development Authority has allotted to you Builders Residential Group Housing Plot of Land No. GH-04, Sector-01, Lease Deed of which has already got executed in your favour. According to the conditions of the Allotment Letter/ Lease Deed, you were required to make the payments of the due installments of the plot of land, but since you have not made the payment of the due amount within the stipulated period of time, in respect of the above plot of land, at present principal amount of the installment Rs.85,10,04,645/- and outstanding amount of Additional Compensation of Rs.29,96,95,167/- and Annual Lease Rent amounting Rs.8,91,92,115/- have not been got deposited.”

32. We have noticed above that a letter was written by the Appellant to the Resolution Professional on 18.09.2019, which letter reads as:

*“GREATER NOIDA INDUSTRIAL DEVELOPMENT
AUTHORITY
Plot No. 01, Sector Knowledge Park-04, Greater Noida,
District Gautambudh Nagar, UP
*** ***

L. GNIDA/FIN/BRS/2019

Dated Sept., 2019

To,

*Mr. Akash Singhal
Insolvency Professional
IP Regn. No.IBBI/IPA-001/IP-P00137/2017-
18/10279.
Partner- Khandelwal Jain & Co.
G-8 & 9, Ground Floor, Hans Bhawan
1, Bahadur Shah Zafar Marg
New delhi-110002.
Phone 9868145676
Email : akash@kjeo.net*

Subject: Proof of claim by Financial Creditor, namely Greater Noida Industrial Development Authority (GNIDA) in regard to Corporate Insolvency Resolution Process of M/s. Earth Infrastructure Pvt. Ltd. PLOT No. GH-04, SECTOR-01, GREATER NOIDA.

Dear Sir,

Kindly find attached herewith the proof of claim by the Financial Creditor namely, Greater Noida Industrial Development Authority in regard to Corporate Insolvency Resolution Process of M/s. Earth Towne Infrastructure Pvt. Ltd. it is therefore requested that the claim of GNIDA as a Financial Creditor be processed accordingly and no action be taken for disposal of any property of M/s. Earth Towne Infrastructure Pvt. Ltd. including transfer of leasehold rights for the remaining period of lease in favour of any person without liquidating or fully securing the debt payable to GNIDA. Also kindly intimate all other claims lodged against M/s. Earth Towne Infrastructure Pvt. Ltd. You are requested to intimate the date and proceedings by which you shall be examining the claims against M/s. Earth Towne Infrastructure Pvt. Ltd. Kindly acknowledge receipt.

Yours faithfully,

Sd/-

*(NEM SINGH)
Manager (Fin.)
GNIDA"*

33. Along with the above letter, the Appellant has filed Form-C, giving the details of total defaulted amount as Rs.148,37,46,148/-, as on 31.09.2019. The RP in its reply has admitted receipt of the letter dated 18.09.2019 of the Appellant, but no response was given by the RP to the

aforesaid letter, nor any communication was issued thereafter to the Appellant informing the Appellant about the Resolution Plan of the Earth Towne, which had already been approved by the CoC on 07.08.2019.

34. We may also notice at this stage certain portion of the Resolution Plan approved by Adjudicating Authority by order dated 05.04.2021, which relates to the dues of the Appellant. Paragraph 4.1.6 of the Resolution Plan submitted by Roma Unicon Designex Consortium provides as follows:

"4.1.6 Dues towards NOIDA Authority: (@Page 12 of the Resolution Plan)

It has been observed that in the list of claims filed and admitted as per the IM, the same does not include dues payable to Greater NOIDA authorities (GNIDA). RUD has an understanding that the same is due in case of the wholly owned subsidiary Earth Towne Infrastructures Pvt. Ltd., i.e. the Land holding company and not in Earth Infrastructures Limited. Further RUD has an understanding that the land holding company Earth Towne Infrastructures Pvt. Ltd. is not under CIRP proceedings. Further RUD has an understanding that in order to effectively execute the proposed resolution plan, the same cannot be done without GNIDA transferring the land in the manner as proposed in this plan from Earth Towne Infrastructures Limited, resulting into a situation, wherein the GNIDA may file a suit for its claims if any. As per the due diligence carried out by RUD it has been observed that the said claim stands at Rs approximately 144 crores. RUD proposes not to take any liability of GNIDA that may arise for transfer of the land in the

manner as proposed in this plan, as the admission of the said claim will make the project unviable for the reason the cost towards settling of such claim will have to be burdened upon the financial creditors being home buyers and also the fact that RUD will then not be able to satisfy the claims of the said financial creditors.

The list of reliefs sought for the proposed transfer of the land from GNIDA has been proposed separately in this plan.”

35. Similarly, we may also notice the relevant parts of the Resolution Plan submitted by the Alpha Corp Development Private Limited with regard to Project Earth Sapphire Court and Earth Techone. Part-C of the Plan, which deals with Earth Sapphire Court in paragraph 4, provides as follows:

“4. Dues towards Noida Authority

As per the IM, the claims admitted do not include dues payable to Greater Noida Industrial Development Authority (GNIDA). The Resolution Applicant proposes not to take any liability to GNIDA that may arise for transfer of the land in the manner as proposed in this plan, as such admission of any such claim will make the project unviable. Further, the Resolution Applicant seeks waiver of “GNIDA Dues”. However, if such waiver is not granted to the Resolution Applicant by GNIDA, then such dues shall be proportionately distributed amongst all the Allottees of “Earth Sapphire Court”.

36. Similarly, in paragraph 3, relating to Earth Techone Project, Clause 4 provides as follows:

“4. Dues towards Noida Authority

As per the IM, the claims admitted do not include dues payable to Greater Noida Industrial Development Authority (GNIDA). The Resolution Applicant proposes not to take any liability to GNIDA that may arise for transfer of the land in the manner as proposed in this plan, as such admission of any such claim will make the project unviable. Further, the Resolution Applicant seeks waiver of “GNIDA Dues”. However, if such waiver is not granted to the Resolution Applicant by GNIDA, then such dues shall be proportionately distributed amongst all the Allottees of “Earth TechOne”.

37. The Adjudicating Authority by the impugned order dated 05.04.2021 while approving the Resolution Plan of Roma Unicon Designex Consortium has issued following directions in paragraph-15:

*“15. All waivers, Reliefs, Concessions and exemptions as prayed for in the Resolution Plan by the Resolution Applicant(s) fall within the parameters of I&B Code, 2016, and other applicable laws. Therefore, to the extent **Earth Towne** project with effect from the plan approval date, all inquiries, investigation and proceedings, whether civil or criminal, suits, claims, disputes, interests and damages in connection with the Corporate Debtor or the affairs of the Corporate Debtor and its related subsidiary, pending or threatened, present or future in*

relation to any period prior to the plan approval date, or arising on account of implementation of this resolution plan shall stand withdrawn, satisfied and discharged including that of Greater Noida Authority. From the date of approval of the 'Resolution Plan', the Resolution Applicant(s) shall be legally authorised to seek transfer of project land, title, interest including all rights from Greater Noida Authority, and appropriate orders from respective authorities/ courts/ tribunals for renewal of licences/ withdrawal/ dismissal or abatement of the proceeding as the case may be. Further, from the date of approval of the Resolution Plan, except as provided in the Resolution Plan, all the pending statutory dues including taxes, cess/ interest/ penalty and other liabilities due to the operational creditors shall stand discharged/ satisfied/ waived off."

38. Similarly, by order dated 08.06.2021, while approving Resolution Plan submitted by M/s. Alpha Corp Development Private Limited, the Adjudicating Authority has provided for concessions or abatement as claimed in the Resolution Plan.

39. Having noticed certain contents of the Lease Deed, Development Agreement, details in Information Memorandum and some other details, we now need to consider the respective submissions of learned Counsel for the parties.

40. From the submissions of learned Counsel for the parties and materials on record, following are the issues which arise for consideration in these Appeal(s):

- (I) Whether in the CIRP proceedings of the Corporate Debtor, i.e. Earth Infrastructures Limited, the assets of the land holding companies, i.e., subsidiary of the Corporate Debtor can be treated to be assets of the Corporate Debtor?
- (II) Whether, in the Resolution Plans submitted by the Successful Resolution Applicants, i.e., Roma Unicon Designex Consortium and Alpha Corp Development Private Limited, the assets of the subsidiary, i.e., lease lands could have been dealt and the Resolution Plan could legally contain a clause for transfer of the lease hold rights by the Appellant in favour of Successful Resolution Applicant without there being any prior permission from the Appellant?
- (III) Whether assets of the subsidiary companies can be dealt with in Corporate Insolvency Resolution Process of holding Company?
- (IV) Whether the Appellant was required to be made party to the CIRP proceedings and heard before approval of any resolution plan dealing with the Project land?
- (V) Whether, Resolution Professional acted within the ambit of I & B Code in giving a certificate that Resolution Plans submitted by Roma Unicon Designex Consortium and Alpha Corp Development Private Limited are in accordance with the provisions of the Code?

- (VI) Whether Appellant was aware of the development carried out by the Corporate Debtor on the lease land before commencement of the CIRP of the Corporate Debtor?
- (VII) What is the way out in the facts and circumstances of the present case?

41. We may first notice the objection raised on behalf of Successful Resolution Applicant and Flat Buyer Association regarding the delay in filing the Appeal. It is stated in the Reply that Order was passed on 05th April, 2021 and the Appeal has been e-filed on 24th May, 2022 and physically filed in this Tribunal on 26th May, 2022. We need to refer the Judgement of Hon'ble Supreme Court passed in Suo Moto Writ Petition No. 03 of 2020 dated 10th January, 2022. By Order dated 10th January, 2022, the Hon'ble Supreme Court held that in computing the period of limitation for petitions/applications/appeals/suits, the period from 15/03/2020 to 28/02/02022 shall stand excluded. Hon'ble Supreme Court further held that in case where the limitation would have expired during the period 15/03/2020 to 28/02/2022 notwithstanding the actual balance period of limitation, all person shall have a limitation period of 90 days i.e. from 01st March, 2022 to 29th May, 2022. As per the judgement of the Hon'ble Supreme Court as above, the period of limitation for filing the Appeal expiring between 15th March, 2020 to 29th May, 2022 and appeal having been filed within 90 days period as provided by the said order, the Appeal

cannot be held to be barred by time. The objection regarding the limitation is overruled.

42. The Issue Nos. (I), (II) and (III) being inter-related, are taken up together.

43. The Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and for matters connected therewith or incidental thereto. The 'Corporate Debtor' means a corporate person who owes a debt to any person. The CIRP begins against a Corporate Debtor when he owes a debt and commits default in repayment of the debt. After appointment of IRP, the IRP comes into picture by issuing a Public Announcement of CIRP against the Corporate Debtor. The IRP is vested with the management of the Corporate Debtor from the date of his appointment. Section 18 of the I&B Code deals with 'Duties of interim resolution professional'. Section 18, sub-section (1) is as follows:

"18. Duties of interim resolution professional.—(1) The interim resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

- (i) business operations for the previous two years;*
- (ii) financial and operational payments for the previous two years;*

(iii) *list of assets and liabilities as on the initiation date; and*

(iv) *such other matters as may be specified;*

(b) *receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;*

(c) *constitute a Committee of Creditors;*

(d) *monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the Committee of Creditors;*

(e) *file information collected with the information utility, if necessary; and*

(f) *take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—*

(i) *assets over which the corporate debtor has ownership rights which may be located in a foreign country;*

(ii) *assets that may or may not be in possession of the corporate debtor;*

(iii) *tangible assets, whether movable or immovable;*

(iv) *intangible assets including intellectual property;*

(v) *securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term “assets” shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”

44. The IRP has to collect all information relating to the assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor, including information relating to liabilities on the date of initiation of CIRP. Section 18 uses the expression ‘assets’, ‘finances’ and ‘operations’. We, in the present case, are concerned with the Project land, which is an immovable property leased to Earth Towne and other two land holding Companies with respect to other two Projects where Special Purpose Company was incorporated for the purpose of lease of the land. While noticing the facts of the case, we have noted that allotment of land was initially in the name of a Consortium consisting of Earth Infrastructure Ltd. as Lead Member. The Scheme of allotment itself has

envisaged that Special Purpose Company, as suggested by Consortium/ Allottees shall lease out the land for purposes of carrying out development work. The land holding Company was incorporated as Special Purpose Company, only for the purpose of carrying out development in the land. We have noticed the terms of the Lease Deed dated 01.09.2010 executed by Appellant in favour of Earth Towne. The Special Purpose Company was “TO DEVELOP AND MARKET THE PROJECT ON DEMARCATED PLOT” under the terms and conditions of the Lease, the Lessee was under obligation to pay the premium of the land and the yearly lease rent and all other charges. Lease Deed recognised Lessee as the entity who was to discharge all obligation towards the Appellant. Admittedly, Lessee is the subsidiary Company of the Corporate Debtor Earth Infrastructure Ltd. Earth Infrastructure Ltd., the holding Company had initially 78% share in the subsidiary Company, which subsequently increased to 98%. The Scheme of the Code has referred the assets of the subsidiary, assets of any Indian or foreign subsidiary of the Corporate Debtor. Thus, assets of the Corporate Debtor and assets of subsidiary of the Corporate Debtor have been separately recognised and dealt with. Section 18, sub-section (1), Explanation further clarifies the law when it says that assets shall include the assets, meaning thereby assets of the Corporate Debtor, shall not include assets of any Indian subsidiary. In the CIRP of Corporate Debtor, thus, assets of subsidiary Company, i.e., Earth Towne were not to be taken into consideration or treated as the assets of the Corporate Debtor. As regards, the law relating to resolution process of a corporate person is

concerned, the law is concerned with assets of the Corporate Debtor and its liabilities, so as to focus the resolution on the assets of the Corporate Debtor. The natural corollary to the above provision is that the assets of the subsidiary Company cannot be dealt with, in CIRP of a holding Company. Holding Company and subsidiary Company have separate legal status and the assets of subsidiary Company cannot be taken into consideration.

45. The learned Counsel for the Appellant has also relied on the judgment of the Hon'ble Supreme Court in **(2020) 13 SCC 308 - Embassy Property Developments Private Limited vs. State of Karnataka and Ors.**, where the Hon'ble Supreme Court had occasion to notice the provisions of Section 18 of the Code. In the above case, the Corporate Debtor had a mining lease granted by Government of Karnataka, which was to expire on 25.05.2018. Notice for premature termination of lease had already been issued on 09.08.2017. The IRP wrote a letter to Director of Mines seeking the benefit of deemed extension of lease, which was rejected by the State of Karnataka. The IRP has initially filed a Writ Petition in the High Court of Karnataka seeking a declaration that mining lease should be deemed to be valid upto 31.03.2020, which Writ Petition was subsequently withdrawn and thereafter Resolution Professional moved an Application before the NCLT, praying for set-aside the order of Government of Karnataka and seeking a declaration that lease should be deemed to be valid upto 31.03.2020. In the above context, the Hon'ble Supreme Court had occasion to consider the provisions of Section 18 of the Code and the

jurisdiction of NCLT to consider the Application of Resolution Professional. In paragraph 39, the Hon'ble Supreme Court extracted provision of Section 18(1) (g) and explanation and in paragraph 40 made the following observations:

“40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term “assets” under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word “assets”, while Section 20(1) uses the word “property” together with the word “value”. Sections 18 and 25 do not use the expression “property”. Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:

“25. Duties of resolution professional.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:

*(a) ****

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings;”

(emphasis supplied)

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).”

46. The Hon’ble Supreme Court clearly noted that assets owned by third party, which is in possession of the Corporate Debtor under contractual arrangements, is specifically kept out of the term of “assets” under the explanation to Section 18. In paragraph 42 of the judgment, the Hon’ble Supreme Court has noticed that Resolution Professional knowing well that NCLT had no jurisdiction in the matter had initially filed Writ Petition in the High Court. In paragraph 42 following observation has been made:

“42. In fact the resolution professional in this case appears to have understood this legal position correctly, in the initial stages. This is why when the Government of Karnataka did not grant the benefit of deemed extension, even after the expiry of the lease on 25-5-2018, the resolution professional moved the High Court by way of a writ petition in WP No. 23075 of 2018. The prayer made in WP No. 23075 of 2018 was for a declaration that the mining lease should be deemed to be valid up to 31-3-2020. If NCLT was omnipotent, the resolution professional would have moved the NCLT itself for such a declaration. But he did not, as he understood the legal position correctly.”

In paragraphs 45 and 46, it was further held:

“45. A lot of stress was made on the effect of Section 14 of the IBC, 2016 on the deemed extension of lease. But we do not think that the moratorium provided for in Section 14 could have any impact upon the right of the Government to refuse the extension of lease. The purpose of moratorium is only to preserve the status quo and not to create a new right. Therefore nothing turns on Section 14 of the IBC, 2016. Even Section 14(1)(d) of the IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in Section

14(1)(d), will have nothing to do with the rights conferred by a mining lease especially on a government land. What is granted under the deed of mining lease in ML 2293 dated 4-1-2001, by the Government of Karnataka, to the corporate debtor, was the right to mine, excavate and recover iron ore and red oxide for a specified period of time. The deed of lease contains a schedule divided into several parts. Part I of the Schedule describes the location and area of the lease. Part II indicates the liberties and privileges of the lessee. The restrictions and conditions subject to which the grant can be enjoyed are found in Part III of the Schedule. The liberties, powers and privileges reserved to the Government, despite the grant, are indicated in Part IV. This Part IV entitles the Government to work on other minerals (other than iron ore and red oxide) on the same land, even during the subsistence of the lease. Therefore, what was granted to the corporate debtor was not an exclusive possession of the area in question, so as to enable the resolution professional to invoke Section 14(1)(d). Section 14(1)(d) may have no application to situations of this nature.

46. Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute supplemental lease deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non iudice.”

47. The above judgment of the Hon'ble Supreme Court clearly lays down that for asset, which is not the asset of the Corporate Debtor, there will be no jurisdiction with the NCLT to deal with lease hold rights.

48. This Tribunal in ***Company Appeal (AT) (Insolvency) No.229 of 2018 - M/s Dynepro Pvt. Ltd. vs. Mr. V. Nagarajan*** decided on 30.01.2019, after noticing the provisions of Section 18 in paragraph 17, has made following observation:

“As per the explanation for the purpose of Section 18(1), the term ‘assets’ do not include assets owned by a third party in possession of the corporate debtor held under contractual arrangements including bailment. It also do not include assets of any Indian or foreign subsidiary of the corporate debtor and such other assets as may be notified by the Central Government.”

49. This Tribunal in ***Company Appeal (AT) (Insolvency) No. 182 of 2018 in Bhavik Bhimjyani vs. Uday Vinodchangra Shat, RP of Neelkanth Township & Construction Pvt. Ltd. & Ors.*** has reiterated that Resolution Professional has no jurisdiction to take over any assets of the subsidiary Company of the Corporate Debtor. In paragraph 8 of the judgment, following has been laid down:

“8. We make it clear that the Resolution Professional/ Liquidator has no jurisdiction to take over any asset of the subsidiary company of the Corporate Debtor including ‘Urban Rupi Infrastructure Private Limited’ and ‘Neelkanth Palm Realty Private Limited’, therefore, the Resolution Professional cannot take the

original documents available with the subsidiary companies though he may take authenticated photocopies of those documents.”

50. We may also look into the Information Memorandum with respect to the Project Earth Towne, Earth Sapphire Court and Earth Techone. We have extracted the relevant part of the Information Memorandum in foregoing paragraphs of this judgment. With regard to Earth Towne Project name of land owner has been mentioned as M/s Earth Infrastructure Ltd., M/s Raus Infrass Ltd. and M/s. Shalini Holdings Limited, which was not correctly mentioned, since the lease hold rights were with Earth Towne Infrastructure and the Information Memorandum itself noted that property is on lease hold right and Lessor is Greater Noida Industrial Development Authority. With regard to other two Projects, the Information Memorandum mentions name of land owners as M/s Nishtha Software Pvt. Ltd. and M/s Neo Multimedia Ltd. Further, it has noted that it has a lease land whose Lessor is Greater Noida Industrial Development Authority. When we look into the Information Memorandum as a whole, it is clear that land was a lease land, leased by the Appellant to land holding Company. However, Information Memorandum does not indicate that Project land belong to the Corporate Debtor in any manner. Only mention in the Information Memorandum is a Development Agreement with land holding Company of the Corporate Debtor. Thus, the Information Memorandum also in no manner represented that Corporate Debtor is the owner of Project land. When the Information Memorandum did not include the Project land as the

asset of the Corporate Debtor, there was no occasion to include the Project land in the Resolution Plan. From the Lease Deed executed by the Appellant in favour of land holding Company, it is clear that contractual Agreement was between the Lessor and Lessee. The Resolution Plan seeks to transfer, not only the development rights on the Project land, but also the title of the land in favour of third entity, without obtaining prior approval of the Lessor. Transfer of land by the Lessor was subject to Clauses of the Lease Deed and permission to transfer the land could have been granted by the Appellant on fulfilment of various conditions enumerated therein. The Resolution Plan contains a provision where the Appellant is obliged to transfer the Project land in favour of the Successful Resolution Applicant.

51. The Resolution Plan does not confine itself to the development rights, which were granted by the land owning company in favour of the Corporate Debtor on an unregistered Agreement, but also contemplates transfer of title of land in favour of Successful Resolution Applicant/ Special Purpose Company as contemplated in the Resolution Plan, which is an impermissible. The Development Agreement, which was unregistered document, could not have dealt with any right in the Project land and the lease hold right as per Development Agreement continued with the Lessee. Hence, the Resolution Plan could not have provided for transfer of the lease land in favour of Successful Resolution Applicant/ Special Purpose Company. Admittedly, the Appellant was not party to the Development Agreement, which was executed between land holding Company of the

Corporate Debtor. The Appellant not being the creditor of the Corporate Debtor nor stakeholder in the CIRP Resolution Plan could not bind the Appellant in any manner. It is also relevant to notice that development agreement dated 09.09.2010 being an unregistered agreement could not have transferred any right in the lease land in favour of the developer. The Appellant not being party to such development agreement, the same is not binding on Appellant.

52. Learned Counsel for the Respondents have placed much reliance on Judgement of this Tribunal in **“New Okhla Industrial Development Authority Vs. Nilesh Sharma, Resolution Professional & Anr.”** in Company Appeal (AT) Ins. No. 288 of 2021 decided on 08th March, 2022. The above Appeal was filed in this Tribunal against Order dated 2nd March, 2021 passed by the Adjudicating Authority by which order the Adjudicating Authority directed the NOIDA Authority to lodge its claim with Resolution Professional and participate in the CIRP Process. The Appeal against the said Order was dismissed by this Tribunal by the above Judgment. The Judgment of this Tribunal in “Nilesh Sharma, RP” (supra) has several distinguishable features from the present case. The NOIDA Authority was challenging the Order of the Adjudicating Authority by which NOIDA Authority was directed to participate in the CIRP Process and file its claim. In the present case, the Appellants were never asked to participate in the CIRP Process and Resolution Professional wrote to the Appellant only after approval of the Resolution Plan by the Adjudicating Authority. The Adjudicating Authority in the case of “Nilesh Sharma, RP” (supra) has held

the NOIDA Authority to be necessary party in the CIRP Process whereas in the present case in the CIRP process, NODIA Authority was never asked to participate rather information was given to the NOIDA Authority only after the approval of the Resolution Plan. The Adjudicating Authority in the above case has directed the Resolution Professional to seek consent of the NOIDA Authority for a Resolution Plan. The Order of the Adjudicating Authority which was under challenge in the case of “Nilesh Sharma, RP” (supra) has been noted in paragraph 1 of the Judgement which is to the following effect:

“1. Challenge in this Company Appeal Insolvency No. 288 of 2021 is to the Common Impugned Order dated 02/03/2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi, Bench III), in IA 4538 of 2020 in IB – 1771/ND/2018 filed by ‘M/s. Victory Ace Social Welfare Society’ (hereinafter referred to as ‘Victory Ace’) and IA 5050 of 2020 filed by ‘New Okhla Industrial Development Authority’, (hereinafter referred to as ‘NOIDA’) respectively. By the Impugned Order, the Adjudicating Authority has allowed the IA filed by the Resolution Professional and dismissed I.A. 5050 of 2020 filed by NOIDA/the Appellant herein, observing as follows:

17. We are further in agreement with the contention of the Applicant/(that through the instrument of JDA, the CD has only right- in- personam against the Lessee i.e., Logix and the

said right of CD is limited developing the residential complex for which the allottees paid directly the CD upon various stages of completion of the project. All future FSIs remained with Logix (the original Lessee of the Land). It is clear from terms of JDA that CD has a limited role of undertaking development of residential project acting jointly with Logix.

18. In the present case, it is seen that existence of JDA was in the knowledge of NOIDA and all approvals as required under the Lease Deed have been granted by the said authority. In effect, there has been implied acceptance of the JDA by NOIDA authority. NOIDA Authority has raised the issue of entering into JDA by CD with Logix only when the Resolution Professional was asked by this Tribunal to approach the said authority and seek its participation in CIRP, and has come up with the argument that the said Development Agreement. has been entered into without its due permission. This argument of NOIDA seems to be an attempt to remain away from the CIRP process at this stage, which could result in a situation where commitments made to the Allottees would not be fulfilled and the rights of homebuyers will get jeopardized. Such a situation cannot be allowed to happen in the instant case in the light of the ratio laid down by the Hon'ble Supreme Court in the matter of Bikram Chatter & Ors. Vs. Union of India & Ors., (supra). The

same is relied upon by the Resolution Professional in his reply.

19. The counsel for NOIDA has heavily relied upon the judgement of Hon'ble Supreme Court in the matter of Municipal Corporation of Greater Mumbai (MGM) Vs. Abhilash Lal & Ors, in Civil Appeal No. 6350 of 2019 in support of his contention that NOIDA authority cannot be asked to become member of CoC. However, the facts of present case are different from those of the above case. In the instant case, the Applicant is seeking participation of NOIDA authority in CIRP to ensure that the said process could go on without any hindrance and objection from any quarter, since NOIDA is a necessary party being owner (Lessor) of the land upon which CD is constructing the project in terms of JDA entered into with Logix (the Lessee). In any case, even otherwise, when NOIDA becomes part of COC to the extent of its dues against CD in terms of JDA, the same shall be protected in terms of the Claim, which it may file before Resolution Professional.

20. To sum up, we take a holistic view of the entire matter and deem it fit to protect the interests of homebuyers in terms of objective of the Code. Therefore, we are of the considered opinion that under the given facts and circumstances, NOIDA Authority is directed to lodge its due claim with Resolution Professional as per law and participate in the CIRP process

through duly Authorised person and attend all future CoC meetings participate in the discussions/ negotiations on the Resolution Plans submitted by prospective Resolution Applicants, and give consent to the Resolution Plan sought to be approved by the CoC.”

(Emphasis Supplied)

53. It is true that in the above case also, CIRP Process was initiated against the Corporate Debtor and not the Lessee of the Land and in the Resolution Process of the Corporate Debtor, the Adjudicating Authority directed Appellant-NOIDA Authority to file its claim and participate in the CIRP Process. The Adjudicating Authority while dismissing the Appeal has held that under the Development Agreement, the Corporate Debtor has proprietary right. This Tribunal also observed that no steps were taken by the Appellant to cancel the lease deed. Further this Tribunal held that the Tribunal vide Order dated 07th April, 2021 rejected the prayer of filing of the claim by the Appellant by that time Resolution was approved by the Committee of Creditors which Order was not challenged and had become final. The aforesaid facts have been noticed in paragraph 26 of the Judgement which are to the following effect:

“26. Though the aforesaid para speaks of withdrawals and modifications of ‘Plans’ submitted by the Resolution Applicants, the stress placed on the importance of timelines to be adhered to cannot be undermined. The Adjudicating Authority has allowed IA 4538 of 2020 filed by M/s. Victory Ace Social Welfare Society seeking a direction to NOIDA

to participate in the CIRP Proceedings. This Application was allowed by the Adjudicating Authority with a direction to NOIDA to lodge its due 'Claim' with the RP as per law and participate in the CIRP Process through a duly authorised person and attend all the meetings. However, NOIDA preferred this Appeal seeking to set aside the Common Impugned Order dated 02/03/2021, instead of exercising their right in participating in the CIRP Proceedings and filing their 'Claim' before the RP. Vide Order dated 07/04/2021, this Tribunal had rejected the prayer for filing of claim by the Appellant observing that the Resolution Plans were pending approval before the CoC. This Order has not been challenged and has attained finality. In the meantime, the CoC has approved the Resolution Plan by a majority of 90% votes on 07/05/2021."

54. In view of the factors as noticed above, it is clear that the Judgement of this Tribunal in "Nilesh Sharma, RP" does not help the Respondents in the present case. In "Nilesh Sharma" case, the Adjudicating Authority directed the NOIDA Authority to participate in the CIRP Process and file its claim in the Insolvency Resolution Process whereas in the present case neither the Appellant were asked to participate in the CIRP nor file their claim rather they were informed by the Resolution Professional only after approval of the Resolution Plan. It is further to be noted that the Judgement do not consider the provisions of Section 18 hence can not be held to be a binding precedent holding that assets of a subsidiary can be included in the assets of holding company. We thus are of the view that the

Judgement of this Tribunal in “Nilesh Sharma, RP” does not help the Respondents in any manner.

55. We may also notice that Judgement of this Tribunal in “Nilesh Sharma, RP” (supra) has been challenged before the Hon’ble Supreme Court by filing Civil Appeal No. 4665 of 2022 in New Okhla Industrial Development Authority Vs. Nilesh Sharma & Anr where Hon’ble Supreme has issued notice on 25.07.2022 and has passed following order:

“Issue notice.

Mr. Karan Batura, AOR accepts notice on behalf of respondent no.1. Let Lessee (M/s. Logix City Developers Pvt. Ltd.) be made a party respondent.

Let notice be issued to respondent no.2 and added respondent, returnable on 29.08.2022.

Dasti, in addition, is permitted to be served.

After we have heard the learned Counsel for the parties, before we proceed with the matter further, let the Resolution Professional represented by Mr. Dewan may revisit the Resolution Plan and furnish the revised proposal to the appellant which may take care of their interest as well by 12.08.2022.

A joint meeting thereafter be held with the senior authorized officers of the New Okhla Industrial Development Authority (NOIDA), Resolution Professional, including the resolution applicant and others, if required, so as to find out some amicable solution, including the Lessee (M/s. Logix City

Developers Pvt. Ltd.) within the ambit of IBC, if possible, within two weeks thereafter.

List on 30th August, 2022 (NMD).

In the meantime, further proceedings qua the appellant shall remain stayed. However, the Tribunal is at liberty to proceed with other aspects of the matter.”

56. The Judgement of this Tribunal in “Nilesh Sharma” case thus is still under scrutiny by the Hon’ble Supreme Court. However, Hon’ble Supreme Court has granted liberty to Resolution Professional including Resolution Applicant and Others, if required, so as to find out some amicable solution between all parties including the lessee within the ambit of IBC.

57. We may also notice the submissions of Learned Counsel for the Respondent-Successful Resolution Applicant as well as Flat Buyer Association that both the Corporate Debtor as well as the Lessee were one economic entity. It is submitted on behalf of Learned Counsel for the Flat Buyer Association that both Corporate Debtor and Lessee, land holding companies were alter ego of each. The law is well settled that subsidiary company and the holding company are separate entities. Learned Counsel for the Appellant in the above reference has relied on Judgement of the Hon’ble Supreme Court in “**Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay**” [(1955) 1 SCR 876] Paragraph 7. It was held by the Hon’ble Supreme Court that shareholder does not acquire any interest in the assets of the company by purchasing shares of company. Following was observed in paragraph 7 of the Judgement:

“It was argued by Mr. Kolah on the strength of an observation made by Lord Anderson in Commissioners of Inland Revenue v. Forrest that an investor buys in the first place a share of the assets of the industrial concern proportionate to the number of shares he has purchased and also buys the right to participate in any profits which the company may make in the future. That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the Sholapur Mills Case. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company.”

58. We may further notice the scheme which was floated by Appellant for allotment of land and the terms and conditions of the lease deed. The lease deed itself contemplated formation of separate Special Purpose Company for carrying out the development on the allotted land. As noted above, allotment of land under Earth Towne was made in the name of three

companies namely M/s. Earth Infrastructures Limited being lead member, the purpose and object of the allotment was for development of land for purposes of urban planning hence the scheme of the allotment insisted for formation of Special Purpose Company so as NOIDA Authority may deal with said Special Purpose Company to carry out the development. The lease deed further contemplated that lead member shall continue to always possess 51% shareholding in the Special Purpose Company. Lease Deed is fully cognizant of the entity of the Corporate Debtor who was a lead member of the SPV and SPV created for the purposes of development. The formation of Special Purpose Company was with an object and the submissions of Respondent cannot be accepted that both should be treated as one entity. The lease deed has noted that M/s. Earth Towne Infrastructure Pvt Ltd. on the request of consortium has been accepted to be Special Purpose Company. It is useful to notice following extract of the Lease Deed dated 01.09.2010:

“AND WHEREAS the Lessor has through a Sealed Two-Bid tender System awarded to the CONSORTIUM CONSISTING OF

- *M/S EARTH INFRASTRUCTURE LTD.*
- *M/S. RAUS INFRAS LTD.*
- *SHALINI HOLDINGS LTD.*

the plot No. GH-04 SECTOR-01, GREATER NOIDA, after fulfilling the terms and conditions prescribed in the brochure and its corrigendum, if any, vide Reservation/Acceptance Letter No. PROP/BRS/2010/2226 dated 04.03.2010 & for

*the development and marketing of Group Housing Pockets/Flats/Plots (in case of plotted development) on the detailed terms and conditions set out in the said approved the name and status of **M/s. Earth Towne Infrastructures Pvt. Ltd.** on the request of consortium members (as mentioned above), in accordance with the Clause – C-8 (e) of the brochure of the scheme, **to develop and market the project on demarcated plot no. GH-04, Sector-01, GREATER NOIDA measuring 73942.00 sq. mtrs.***

*AMN WHEREAS the lessee is a **Speacial Purpose Company** comprising of-*

S. No.	Name of Member	Shareholding	Status
1.	M/s Earth Infrastrucrure Ltd.	78%	Lead Mmeber
2	M/s. Raus Infrass Ltd.	11%	Relevant Member
3	M/s. Shalini Holdings Ltd.	11%	Relevant Member

*And it has been represented to the Lessor that the **Special Purpose Company** members have agreed amongst themselves that **M/s. EARTH Infrastructure Ltd., having its office at 26, First Floor, Pusa Road, Karol Bagh, New Delhi - 110005** shall remain always be the Lead Member of the Special Purpose Company and whose shareholding in the **Special Purpose Company** shall remain unchanged till the occupancy/completion certificate of at least one phase of the project is obtained from the lessor (Authority). However, the Special Purpose Company*

will be allowed to Transfer/Sell up to 49.00% of its shareholding, subject to the condition that the original "Relevant Members" including the "Lead Member" (on the date of submission of the tender) shall continue to hold at least 51.00% of the shareholding and the "Lead Member" shall remain unchanged till the occupancy/completion certificate of at least one phase of the project is obtained from the Lessor."

59. Thus the Corporate Debtor, who was lead member of the Special Purpose Company, was contemplated to be separate entity and the contention of the Respondent that both should be treated to be one entity cannot be accepted. It is further relevant to notice that Learned Counsel for the Respondents have also contended that Corporate Veil of the land holding company be pierced and should be lifted in the facts of the present case which will make it clear that it is the corporate debtor which is behind the land holding companies. Lifting of Corporate Veil between the subsidiary and parent company have been legally accepted proposition. Hon'ble Supreme Court in "Vodafone International Holdings BV Vs. Union of India and Anr." [2012 6 SCC 613]. In paragraph 254-258, has noted the legal principle with regard to relationship between subsidiary company and holding company which is as follows:

"254. Companies Act in India and all over the world have statutorily recognised subsidiary company as a separate legal entity. Section 2(47) of the Indian Companies Act 1956 defines "subsidiary company" or "subsidiary", a subsidiary company within the meaning of Section

4 of the Act. For the purpose of Indian Companies Act, a company shall be subject to the provisions of sub-section 3 of Section 4, be deemed to be subsidiary of another, subject to certain conditions, which includes holding of share capital in excess of 50% controlling the composition of Board of Directors and gaining status of subsidiary with respect to third company by holding company's subsidization of third company.

*255. A holding company is one which owns sufficient shares in the subsidiary company to determine who shall be its directors and how its affairs shall be conducted. Position in India and elsewhere is that the holding company controls a number of subsidiaries and respective businesses of companies within the group and manage and integrate as whole as though they are merely departments of one large undertaking owned by the holding company. But, the business of a subsidiary is not the business of the holding company (See *Gramophone & Typewriter Ltd. v. Stanley, (1908-10) All ER Rep 833 at 837*).*

256. Subsidiary companies are, therefore, the integral part of corporate structure. Activities of the companies over the years have grown enormously of its incorporation and outside and their structures have become more complex. Multi National Companies having large volume of business nationally or internationally will have to depend upon their subsidiary companies in the national and international level for better returns for the investors

and for the growth of the company. When a holding company owns all of the voting stock of another company, the company is said to be a WOS of the parent company. Holding companies and their subsidiaries can create pyramids, whereby subsidiary owns a controlling interest in another company, thus becoming its parent company.

257. The legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In Bacha F. Guzdar v. CIT, this Court held that shareholders' only right is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting. Refer also to Carew and Company Ltd. v. Union of India and Carrasco Investments Ltd. v. Special Director, Enforcement.

258. Holding company, of course, if the subsidiary is a WOS, may appoint or remove any director if it so desires by a resolution in the General Body Meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can

be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary are allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.”

60. It was clearly held by the Hon’ble Supreme Court relating to relationship between holding company and wholly owned subsidiary that they are two distinct companies and holding company does not own the assets of the subsidiary.

61. We may also notice judgement of the Hon’ble Supreme Court in **“Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Limited and Ors.”** [2022 1 SCC 401]. Insolvency Resolution Process in the above case was initiated against the “JIL” which hold 100% equity shareholding of “JHL” (Jaypee Health Care Limited). Substantial part of shareholding of JHL was pledged with the lenders. The argument was raised on behalf of the Financial Creditor of JHL that assets of its debtor JHL could not have been dealt with in the Resolution Plan by Corporate Debtor “JIL”. Hon’ble Supreme Court noticed the above objections and also noticed that objector Yes Bank has given its proposition for evolving a workable mechanism. Observation was made by Hon’ble Supreme Court in paragraph 186 that Resolution Plan essentially dealt with assets of the Corporate Debtor “JIL” and not that of its subsidiary. From the facts which was noticed in paragraph 180 it was clear

that only shareholding of Jaypee Health Care Limited was sought to be divested by JIL which was owning 100% equity shareholding of JHL. The Judgement of Hon'ble Supreme also clearly indicates that only assets of the corporate debtor can be subject to a Resolution Plan.

62. The Judgement of the Hon'ble Supreme Court in above case "**Jaypee Kensington**" supra is also to be noticed on another aspect of the matter. In the above case, the Corporate Debtor was granted lease of the land by Yamuna Expressway Industrial Development Authority which was also constituted under Section 3 of Uttar Pradesh Industrial Area Development Act, 1976. It has provided land for execution of various projects by JAL/JIL under the concession agreement. It was observed by the Hon'ble Supreme that Resolution Plan could have modified the terms of contract but the same could not have been carried out without the approval and consent of the authority concerned. Following has been laid down in paragraph 141, 142 and 142.4:

"141. The contract in question, the CA, even though not a statutory one, is nevertheless a contract entered into between the concessionaire and statutory authority, that is, YEIDA. It is needless to observe that even if in the scheme of IBC, a resolution plan could modify the terms of a contract, any tinkering with the contract in question, that is, the Concession Agreement, could not have been carried out without the approval and consent of the authority concerned, that is, YEIDA. Any doubt in that regard stands quelled with reference to Regulation 37 of CIRP Regulations that requires a

resolution plan to provide for various measures including 'necessary approvals from the Central and State Governments and other authorities'. The authority concerned in the present case, YEIDA, is the one established by the State Government under the U.P. Act of 1976 and its approval remains sine qua non for validity of the resolution plan in question, particularly qua the terms related with YEIDA. The stipulations/assumptions in the resolution plan, that approval by the Adjudicating Authority shall dispense with all the requirements of seeking consent from YEIDA for any business transfer are too far beyond the entitlement of the resolution applicant. Neither any so-called deemed approval could be foisted upon the governmental authority like YEIDA nor such an assumption stands in conformity with Regulation 37 of the CIRP Regulations.

142. Furthermore, the suggestion that Clause 18.1 of the CA had been a one-time measure and that stands exhausted with creation of JIL as SPV and transfer of original concessionaire's rights to JIL, has its own shortcomings. The concept and purport of Clause 18.1, of course, at the relevant time had been of the obligation on the original concessionaire to execute the documents for creation of SPV and this clause came in operation when JIL was created as an SPV. However, it would be wholly unrealistic to say that once JIL was created as an SPV, the said Clause 18.1 stood exhausted and there remained no obligation on the part of JIL (as the substituted concessionaire) to execute the necessary documents if it would propose to transfer its rights and obligations under the CA to

another SPV; and it could do so without the consent of YEIDA. This suggestion carries an inherent fallacy because if Clause 18.1 is removed from the CA, a serious question would arise as to how the rights and obligations of the substituted concessionaire JIL could at all be transferred to another SPV? Looking to the pith and substance of the CA, the said Clause 18.1 has to be applied for creation of any SPV by or on behalf of JIL.

142.1. The other clauses in CA permitting creation of sub-lease could hardly be applied for en bloc transfer of land to the SPVs, as proposed in the resolution plan. The referred Clauses 4.3(d) and 4.3(e) were essentially meant for creation of sub-leases when the land given to the concessionaire for development, or part thereof, was to be sub-leased to the end-user/s. Even in that regard, the provisions were made for the concessionaire to make a request to the land providing agency to execute the lease-deed directly in favour of its subsidiaries, assigns or transferees; and in case the agency and the concessionaire would consider it appropriate, tripartite agreement for sub-lease may be executed. Taking all the relevant clauses together with the substance and purport of CA, it is difficult to countenance that the proposed transfer to SPVs could be treated as an ordinary sub-lease for which, no documentation involving YEIDA would be required.”

63. The above Judgement of the Hon’ble Supreme Court fully supports the view which we are taking in the present matter that without the approval of the Appellant, the leased land could not have been included in

the Resolution Plan nor there could have any direction by the Adjudicating Authority to transfer the lease land without the approval of the Appellant.

64. It is also relevant to notice one more judgement of the Hon'ble Supreme Court which has been relied on by Learned Counsel for the Appellant i.e. "**Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Ors.**" [2020 13 SCC 234]. In the above case, Municipal Corporation of Greater Mumbai owned certain land in village Marol, Andheri (East), Mumbai. A contract was entered into with Seven Hills Health Care Pvt. Ltd. for development of the lease land and to construct 1500 bed hospital. The CIRP was initiated against the Seven Hills Health Care Pvt. Ltd. by Axis Bank where Resolution Plan was submitted by SNMC. Objections were raised by the Appellant to the approval of the plan which was rejected by NCLT and held that plan is in accordance with CIRP Regulations, 2016 and as per Section 29-A which was already approved by the CoC. The Order of NCLT was challenged before this Tribunal which Order was not interfered with by this Appellate Tribunal against which the Municipal Corporation filed an Appeal before the Hon'ble Supreme Court. Hon'ble Supreme Court had occasion to consider the provisions of MMC Act as well as provision of IBC. Hon'ble Supreme Court has in its Judgement held that the Adjudicating Authority could not have approved the plan which included the assets of the Municipal Corporation especially when corporate debtor had not fulfilled its obligation under the contract. Paragraph 33 to 36 lays down following:

“33. The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract.

34. The argument of the RP, the financial institutions (CoC), and the SNMC with regard to MCGM's interest not being affected, in this court's opinion is insubstantial. SNMC's proposed insolvency plan on the one hand no doubt provided for the liquidation of MCGM's liabilities initially to the tune of 102 crores (later revised to over ₹ ₹140 crores). However, the provisions of the resolution plan clearly contemplated infusion of capital to achieve its objectives. One of the modes spelt out in the plan for securing capital was mortgaging the land. Initially, no doubt, SNMC stepped into the shoes of SevenHills and assumed its control. What is important to notice is that the corporate restructuring was a way of taking over of the company's liquidation by SNMC as it was not only Seven Hills' project with shares and liquidation of debts, but also the restructuring of the company's liabilities if necessary, by creating fresh debts and mortgage of the land which directly affected MCGM.

35. Section 92 unequivocally prescribes the method whereby MCGM's properties can be dealt with

through lease or by way of creation of any other interest. The only mode permitted is through prior permission of the corporation. It is a matter of record that in the present case, the resolution plan was never approved by the corporation and that it was put to vote. The contesting parties, including the RP and CoC were unable to point out to anything on the record to establish that a valid permission contemplated by Section 92 was ever obtained with regard to the proposal in the resolution plan. The proposal was approved by the NCLT and MCGM's appeal was rejected by NCLAT. The proposal could be approved only to the extent it did not result in encumbering the land belonging to MCGM.

36. It is evident from a plain reading of Section 92(c), that the Commissioner (of MCGM) is empowered to, with the sanction of the corporation, "lease, sell or otherwise convey any immovable property belonging to the corporation." It is not in dispute that the original contract entered into on 20-12-2005 contemplated the fulfilment of some important conditions, including firstly, the completion of the hospital project within a time frame; and secondly, timely payment of annual lease rentals. It is a matter of record that the hospital project was scheduled to be completed by 24th April, 2013. MCGM cites Clause 15(g) of the contract to urge that within a month of this event, i.e. completion of the hospital, a lease deed had to be executed. This event never took place. Therefore, the terms of the contract remained, in the opinion of the court, an agreement to enter into a lease; it did not per se confer any right or interest, except that in the event of MCGM's

failure or omission to register the lease (in the event SevenHills had complied with its obligations under the contract), it could be sued for specific performance of the agreement, and compelled to execute a lease deed. That event did not occur; SevenHills did not complete construction of the 1600 bed hospital. Apparently, it did not even fulfill its commitment, or pay annual lease rentals. In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract), even the agreement stood terminated due to default by SevenHills. This court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT.”

65. Ultimately, the Hon'ble Supreme Court allowed the Appeal and set aside the Order of the NCLT. The above Judgement also fully supports the view that Adjudicating Authority could not have approved the plan implicating the land which was owned by the Appellant in the CIRP Process of the Corporate Debtor.

66. At this stage, we may also notice the provisions of Uttar Pradesh Industrial Area Development Act, 1976. This Act, 1976 was enacted to provide for the constitution of an authority for the development of certain areas in the State into industrial and urban township and for matters connected therewith. The Appellant is an authority constituted under Section 3 of the Act. Section 7 of the Act provides:

“the Authority may sell, lease or otherwise transfer whether by auction allotment or otherwise any land or building belonging to the Authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose”.

67. The transfer of land thus is statutorily governed and terms and conditions laid down by authority are statutorily protected. Resolution Plan which contains provisions for transfer of the project of the land contrary to the terms and conditions of the lease deed under which the project land was leased out to the land holding company is contrary to the terms and conditions of the lease deed as well as Section 7 of the UP Industrial Area Development Act, 1976. Resolution Plan thus was clearly in breach of the provisions of the 1976 Act which can not be sustained.

68. We have noticed the statutory provision, that Explanation to Section 18(1)(f) clearly contemplates that assets of subsidiary company are entirely different from assets of the holding company and principle of lifting of veil cannot be invoked contrary to statutory prescription as in the present case that is Section 18(1)(f).

69. Now on the question as to whether the Resolution Plan could have contained the provision obligating the Appellant to transfer lease hold right in favour of SRA or any third entity. It is sufficient to notice the terms and

conditions of the lease deed under which land was leased out to the land holding company. For **transfer of plot**, lease deed contains following terms and conditions in lease dated 01.09.2010:

“TRANSFER OF PLOT

1. Without obtaining the completion certificate the Lessee shall have the right to sub-divide the allotted plot into suitable smaller plots as per planning norms and to transfer the same to the interested parties up to 31.03.2010 or as decided by the Lessor, with the prior approval of LESSOR on payment of transfer charges @ 2% of allotment rate. However, the area of each of such sub-divided plots should not be less than 20,000 sq. mts. However, individual flat/plot will be transferable with prior approval of the LESSOR as per the following conditions: -

- (i) The dues of LESSOR towards cost of land shall be paid in accordance with the payment schedule specified in the Lease Deed before executing of sub-lease deed of the flat.*
- (ii) The lease deed has been executed.*
- (iii) Transfer of flat will be allowed only after obtaining completion certificate for respective phase by the Lessee.*
- (iv) The sub-Lessee undertakes to put to use the premises for the residential use only.*

(v) *The Lessee has obtained building occupancy certificate from Building Cell/Planning Section, Greater NOIDA.*

(vi) *First sale/transfer of a flat/plot to an allottee shall be through a Sub-lease/Lease Deed to be executed on the request of the Lessee to the Lessor in writing.*

(vii) *No transfer charges will be payable in case of first sale, including the built-up premises on the subdivided plot(s) as described above. However, on subsequent sale, transfer charges shall be applicable on the prevailing rates as fixed by the LESSOR.*

(viii) *Rs. 1000/- shall be paid as processing fee in each case of transfer of flat in addition to transfer charges.”*

70. The transfer of plot as per terms and conditions of the lease could not have been effected without approval of the Appellant. The Respondent themselves realized that without Appellant transferring the plot no right can be accrued in favour of allottees or SRA that is why the conditions was provided in the Resolution Plan asking the direction to the Appellant to transfer the project land in favour of the SRA or Special Purpose Entity. Thus, Resolution Plan could not have contained clause for transfer of land without there being any approval of the Appellant for such transfer. Further direction to the Appellant to transfer while waiving of its entitlement and charges is clearly contrary to the terms and conditions of the lease and not in a public interest.

71. At this stage, we may also notice one more submission which was pressed by the Learned Counsel for the Successful Resolution Applicant Alpha Corp Development Private Limited. It is submitted by Learned Counsel for the Respondent No. 2-SRA relying on **Section 3 and Section 5 of Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010** that allottees of project Earth Sapphire Court and Tech One have heritable interest in the area of land leased by the Appellant from the date of execution of the respective apartment buyer agreement. Submission is that allottees themselves have become owner from the date of apartment buyers agreement has been executed. We may notice few provisions of **Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010**. Section 3, sub-clause (b) defines "apartment" in following manner:

"Section 3(b), defines "apartment" means a part of any property, intended for any type of independent use, including enclosed spaces located on one or more floors or any part or parts thereof, in a building to be used for residential or official purposes or for the purpose of practicing any profession, or for carrying on any occupation, trade or business (excluding shopping malls and multiplexes) or for such other use as may be prescribed, and with a direct exit to a public street, road or to a common area leading to such street, road and includes any garage or room (whether or not adjacent to the building in which such apartment is located) provided by the promoter for use by the owner of such apartment for parking or, as the case may be,

for the residence of any domestic aide employed in such apartment;”

“Section 3(d) defines "apartment owner" means the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period of thirty years or more;”

“Section 3(g) defines "building" means a building constructed on any land, containing four or more apartments, or two or more buildings in any area designated as a block, each containing two or more apartments with a total of four or more apartments in all such buildings; Provided that an independent house constructed in a row with independent entry and exit, whether or not adjoining to other independent houses, shall not constitute a building.”

72. Section 4(5) of 2010 Act lays down following:

“4. General Liabilities of Promoter-

.....

(5) An apartment may be transferred by the promoter to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per building bye-laws. The completion certificate shall be obtained by

promoter from prescribed authority within the period of two years from the date of sale agreement. Provided that if the construction work is not completed within the stipulated period, with the permission of the prescribed authority :

Provided further that if the completion certificate is not issued by the prescribed sanctioning authority within three months of submission of the application by the promoter complete with all certificates and other documents required, the same shall be deemed to have been issued after the expiry of three months.

Explanation. - For the purposes of this sub-section "completion" means the completion of the construction works of a building as a whole or the completion of an independent block of such building, as the case may be."

73. The builders buyer agreement which was entered into by allottees with the corporate debtor cannot be said to be apartment buyer agreement. Apartment Buyer Agreement is executed after completion and obtaining the completion certificate from the prescribed sanctioning authority. In the present case, in the Information Memorandum, it clearly gives the details of status of the project land which indicates that no project is complete. The apartment as contemplated in 2010 Act are not even in existence in the facts of the present case hence there is no question of applicability of Section 5. Section 5 of the Act deals with rights of apartment owners. Section 5(1) lays down following:

“5 (1) Every person to whom any apartment is sold or otherwise transferred by the promoter shall subject to the other provisions of this Act, be entitled to the exclusive ownership and possession of the apartment so sold or otherwise transferred to him.”

74. The present is not a case where any apartment has been transferred in favour of the allottees. We are of the view that submission made on behalf of the SRA relating to 2010 Act are misconceived.

75. In view of the aforesaid discussions, we answer question nos. 1, 2 and 3 in following manner:

Ans. 1. In the CIRP Process of Corporate Debtor that is Earth Infrastructure Limited, assets of the Land Holding Companies cannot be treated to be assets of the Corporate Debtor.

Ans. 2. Resolution Plan submitted by Roma Unicon Designex consortium and Alpha Corp Development Private Limited could not have dealt with the project land which was a land leased out by the Appellant in favour of the Land Holding Company.

Ans. 3. Assets of the Subsidiary Company cannot be dealt with in the CIRP Process of Holding Company without the permission of the Lessor.

Question No. 4.

76. The Appellant's case in these Appeals are that Appellant was not issued any notice by the Adjudicating Authority for participation in the CIRP Process. From the facts as noticed above, it is clear that the Resolution Professional wrote a letter asking certain information from the Appellant and thereafter only informed about the approval of the Resolution Plan, at no point of time the Appellant was asked to participate in the CIRP Process of the Corporate Debtor. The Resolution Plan which was approved by the Committee of Creditors on 26.08.2019 clearly has dealt with the lease land of the NOIDA Authority. Resolution Professional was well aware that Appellant has its dues on the lease land which have not been paid so far. It was incumbent on the Resolution Professional to inform the Appellant about the Resolution Plan which have been received in the CIRP Process of the Corporate Debtor. The Resolution Professional is an insolvency professional who has been entrusted with various obligations and duties under the I&B Code and the regulations framed thereunder. The Resolution Professional has to take into consideration all liabilities which corporate debtor owns to different and various creditors including government and public authorities. The judgement of the "Nilesh Sharma, RP" (supra) as noticed above indicates that in the said case, application was filed by the association of allottees themselves for impleading the NOIDA Authority which application was allowed and the Adjudicating Authority directed the Resolution Professional to inform the NOIDA Authority and ask them to file a claim. The order passed by the Adjudicating Authority directing the NOIDA Authority to participate and file its claim was

unsuccessfully challenged by the NOIDA Authority in this Tribunal. The Judgment of the Nilesh Sharma itself supports the submissions of Learned Counsel for the Appellant that they were necessary party in the CIRP process of the Corporate Debtor. It is to be noted that the Corporate Debtor was lead shareholder of the land holding company in case of Earth Towne Infrastructures Pvt. Ltd. it being 98% shares and with regard to other two land holding companies it had 100% shareholding. In the CIRP Process of such corporate debtor, the Appellant was necessary party and without they being before the CIRP Process the land leased out by them could not have been made subject matter of the Resolution Plan. We thus answer Question No. 4 in following manner:

Ans. 4. Appellant was required to be made party to the CIRP Process before approval of any resolution plan dealing with project land.

Question No. 5

77. The Resolution Professional was well aware that the project land is a leased out land which has been leased out by the Appellant to the land holding companies which fact has been clearly mentioned in the Information Memorandum. Information Memorandum also mentions few facts regarding the lease rent. Resolution Professional in his submission has also submitted before us that Resolution Professional has shared the details of the dues of the Appellant to the Resolution Applicants. When the Resolution Professional is aware that project land does not belong to the

Corporate Debtor how he permitted the said lease land to be part of resolution plan is question which is unanswered.

78. The development right in the project under which the developer is entitled to carry on development is not akin to any ownership/lease hold right in the leased land. Resolution Professional has certified the Resolution Plan that it is in accordance with I&B Code which clearly deals with the project land that is lease land in its entirety. The Resolution Professional did not communicate to the appellant about the receiving of the Resolution Plan and the nature of resolution plans which have been received nor invited attention of the Appellant that Appellant's dues are not being taken care in resolution plan. The Appellant is also a public authority who is engaged in public functions. Dues of public authority cannot be so casually and negligently dealt with by the Resolution Professional. It is relevant to notice that vide letter dated 18.09.2019 the appellant informed the Resolution Professional about its dues against Towne Infrastructure, the lessee. The Appellant further wrote to RP to intimate the date and proceedings. The RP did not communicate with Appellant nor informed that Resolution Plan has already been approved by CoC dealing with its Land. We are feeling that RP did not reply the letter dated 18.09.2019 since he wanted to conceal from appellant the details of Resolution Plan and proceedings of its approval.

79. In the facts of the present case, we are thus satisfied that the Resolution Professional did not act within the ambit of the Code while certifying that Resolution Plan submitted by Roma Unicon Designex

consortium and Alpha Corp Development Private Limited is in accordance with the provisions of the Code.

Ans. 5. We answer question no. 5, accordingly. We direct the Registry to forward the Copy of this Order to IBBI to examine the work and conduct of RP and take such action as it may deem fit and proper.

Question No. 6

80. The Respondents during their submissions have referred to various materials to indicate that appellants were aware of development on the project land which is being carried out by the corporate debtor. We have noticed while noticing the facts of the case and submissions of the parties that in the year 2017, the associations of two projects namely Earth Sapphire Court and Earth Tech One met the additional Chief Executive Officer (CEO in short). Minutes of the proceedings were drawn by the association itself which have been brought on record which clearly indicate that appellants were aware that corporate debtor is developing the project. The letter written by the Appellant to the Police authorities in the year 2015 also indicate that appellants were aware that it is the corporate debtor who is developing the project land. We have also noticed that the lease deed contains provision under the heading "other clauses" clause 7 which is to the following effect:

"7. The Lessor will monitor the implementation of the project. Applicants who do not have a firm commitment to implement the project within the time

limits prescribed are advised not to avail the allotment.”

81. The lease deed clearly cast an obligation on the Appellant to monitor the implementation of the project. It has been the case of the association of allottees that they have time and again brought to the notice of the Appellant about the misdeeds of the corporate debtor. Reference to Builder-Buyers meeting held on 20th May, 2016 has also been made. We have also noticed the case of the allottees association that in meeting held on 08th May, 2017 and 16th May, 2017 with the CEO of the Appellant it was represented to the Appellant that they will look into as to whether the penal interest can be waived off. The allottees has brought into the notice of the Appellant about the grievances which they were facing due to delay in the project causing financial distress and mental distress to them.

82. We, in the facts and circumstances brought on record, are of the view that Appellant was well aware that the development on the project land is being carried out by the Corporate Debtor. We further, at this stage, may observe that the fact that appellant was aware that the corporate debtor is carrying out development in the project land is not akin to their knowledge of terms and conditions of Resolution Plan which was submitted in the resolution process of the corporate debtor.

Ans. 6. The knowledge by the Appellant of carrying out development by the corporate debtor cannot be read as their consent to transfer the land in favour of the Successful Resolution Applicant or any other person.

Question No. 7.

83. From the facts noticed above, it is clear that corporate debtor advertised three projects Earth Towne Infrastructure Pvt. Ltd., Earth Sapphire Court and Earth Tech One. Large number of home buyers have already been allotted flats in the three projects by the Corporate Debtor and huge amount has been received from the allottees of three projects by the Corporate Debtor. Hundreds of crores were taken by the Corporate Debtor from allottees of three projects. With effect from 2016, the Corporate Debtor has abandoned the projects and no development work has been carried out by the Corporate Debtor thereafter.

84. While noticing the facts of the I.A. No. 4533 of 2022 filed by the Association of two projects that is Earth Sapphire Court and Earth Tech One it has been pleaded that home-buyers have brought into the notice of the Appellant about their plights and default. The complaints were already submitted to CEO of the Appellant by the 83 home buyers on 27th July, 2016 which has been brought on record as Annexure 2-A of I.A. No. 4533 of 2022. The home-buyers has written letter dated 27th July, 2016 and 02nd August, 2016 bringing into the notice of the NOIDA Authority about the failure of the Corporate Debtor. A reply has also been filed by the Earth Towne Flat Buyer Association in Company Appeal (AT) Ins. No. 630 of 2022 where several other materials have been brought on record including complaints submitted to the Appellant regarding the failure of the corporate debtor. Complaint dated 20th June, 2017 filed as Annexure R-11 has been relied on by the Flat Buyers Association. It was mentioned that the home-

buyers are paying bank EMI with interest as well as has paid huge amount to the Corporate Debtor. Reference of meeting with the CEO and Hon'ble Minister dated 11th May, 2017 has also been referred. In the complaint, reference has also been made to an order of the Allahabad High Court dated 23rd February, 2016 where home-buyers have raised various grievances in the writ petition where Allahabad High Court has permitted home-buyers to represent the matter to the CEO which authority was to deal with the matter. It is stated in the complaint that after the order of the High Court dated 23rd February, 2016, they have approached the authorities but no action has been taken. We have already noticed while noticing the facts that in the meetings with the allottees there was representation on behalf of the Appellant that the question of penal interest shall be considered by the Appellant.

85. In spite of default of corporate debtor having been brought into the notice of the NOIDA Authority on several occasions right from 2015 no concrete steps were taken by the NOIDA Authority. We have noticed above that one of the obligations under the lease deed was that Appellant was to monitor the development of the project. Obligation to monitor the project includes obligations of the Appellant to ensure that projects are timely completed and action be taken against the defaulting parties.

86. We may also at this stage notice one Judgement of the Hon'ble Supreme Court which has been relied on by Learned Counsel for the Successful Resolution Applicant that is [2011 6 SCC 508] in "**NOIDA entrepreneurs Association Vs. NOIDA and Ors.**". Hon'ble Supreme Court

in the said Judgement laid down that power vested in the State or in Public Authority should be viewed as a trust coupled with duty to be exercised in all social and public interest. In paragraph 38 to 41, following has been laid down:

“38. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.

39. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a “democratic form of Government demands equality and absence of arbitrariness and discrimination”. The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

40. *The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. (Vide: M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr., AIR 1975 SC 266; Ramana Dayaram Shetty v. The International Airport Authority of India & Ors., AIR 1979 SC 1628; Haji T.M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Shrilekha Vidyarthi etc. v. State of U.P. & Ors., AIR 1991 SC 537; and M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu & Ors., AIR 1999 SC 2468).*

41. *Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. (Vide: Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16; Sirsi Municipality v. Ceceila Kom Francis Tellis, AIR 1973 SC 855; The State of Punjab & Anr. v. Gurdial Singh &*

Ors., AIR 1980 SC 319; The Collector (Distt. Magistrate) Allahabad & Anr. v. Raja Ram Jaiswal, AIR 1985 SC 1622; Delhi Administration (Now NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; and N.D. Jayal & Anr. v. Union of India & Ors., AIR 2004 SC 867).”

87. The facts which have been brought on record indicate that hundreds of crores have been received from the allottees and allottees are waiting for last several years to receive the possession of the flats whereas projects have not proceeded any further from the year 2016. It is due to these hopes that allottees in their meeting of the CoC approved the Resolution Plan so that Resolution Applicants may come and carry on the projects further. The hope and aspiration of the allottees are fully justified. However, as observed above, Resolution Plan could not have dealt with the land which was leased out by the Appellant without permission of the Appellant.

88. We have to find out ways and means to protect the interest of the allottees which is of paramount importance. The developer has failed to carry out the projects. We have also noticed in the written-submissions filed by the SRA and Home Buyer Association that land holding companies have been struck off from the record of the Registrar of Companies (RoC) after initiation of CIRP Process. We feel that striking off the land holding companies from record of RoC was with an intent and object to somehow shed off the liabilities of the Appellant.

89. We have also held that without approval of the Appellant, subject land could not have been transferred in favour of the Resolution Applicants or any other entities. It is obvious that Appellant before granting any permission for transfer of the land shall require their dues pertaining to land premium, lease rent and other legal dues to be cleared.

90. We may also notice that during submissions, Learned Counsel appearing on behalf of Association of Flat Buyer Projects of Earth Sapphire Court and Earth TechOne submitted that they are ready to bear and pay the dues of the Appellant in the interest of the development of the projects. In the facts of the present case, we are of the view that the Appellant has not been diligent to take steps towards recovery of dues and are not entitled to charge any penal interest. We thus direct the Appellant to waive the penal interest and recalculate the dues of the Appellant which was due on the respective land holding companies as on date as held above.

Ans. 7.

91. Looking to the stage at which the projects are as on date and looking to the fact that allottees have paid hundreds of crores rupees in the above three projects to the Corporate Debtor and waiting for possession of the flat for last several years, we have to find out ways and means to save the interest of the allottees as well as the interest of the Appellant. We are of the view that Resolution Professional jointly with Flat Buyer Association of respective projects be permitted to make an Application to the Appellant seeking permission for transfer of land in favour of the proposed resolution

applicants so as to execute the necessary transfer deeds in favour of the allottees subject to payment of dues of the Appellant. It shall be open for the Appellant to enter into an arrangement with the Resolution Applicant and Flat Buyer Associations for payment of dues and thereafter it may permit transfer of the land so ultimately allottees be given rights and the projects can be developed by the SRA.

92. The RP has to publish a fresh Form-G inviting fresh Resolution Plans with specific condition **that resolution plans shall be presented before the COC for consideration only when dues of the appellants are paid and permission of appellant is obtained for transfer of lease land.**

93. The Roma Unicon as well as Alpha Corp shall also be permitted to file resolution plans.

94. The Appellant shall recalculate the dues and communicate to the Resolution Professional and Flat Buyers Associations without charging any penal interest within 15 days. Fresh Resolutions Plans so submitted will be considered and examined by the RP and be submitted before CoC for fresh consideration and approval. The application of Resolution Plan may be filed for approval of the plan, thereafter.

95. In view of the foregoing discussions, we dispose of these Appeals, in following manner:

- i. The Order dated 05th April, 2021 passed by the Adjudicating Authority, the Order dated 08th June, 2021 passed by the Adjudicating Authority and Order dated 07th December, 2021

passed by the Adjudicating Authority in I.A. No. 401(ND)2017 are set aside.

- ii. The Appellant is directed to recalculate its dues payable by the respective land holding companies without charging any penal interest and communicate the same to the Resolution Professional and the Flat Buyer Association(s) of three projects within 15 days of this order.
- iii. The appellant is made party to the CIRP of the Corporate Debtor and shall be entitled to participate in the process hereinafter.
- iv. After receiving the details of the dues, the Resolution Professional shall publish a fresh Form-G containing a condition that Resolution Plans received in pursuance of request for Resolution Plan shall be placed for consideration after receiving prior approval of the Appellant for transfer of land in favour of the proposed resolution applicant subject to arrangement for payment of dues of the Appellant.
- v. The Appellant shall consider granting permission for the transfer of project land under the three projects as above on the terms and conditions as finalized by the Appellant with Resolution Professional and flat buyer associations of respective projects.
- vi. The Resolution Plan so received shall be again examined by the Resolution Professional and placed before the CoC for fresh consideration. All consequential steps shall be taken thereafter.

- vii. All above steps till the submission of application by Resolution Professional before the Adjudicating Authority for approval of the plan, if any, shall be completed within six months from today.
- viii. The CIRP period is extended for a period of six months from today.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Mr. Barun Mitra]
Member (Technical)**

**30th January, 2023
New Delhi**

Archana, Ashwini, Basant B.