

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB) 239/MB/C-I/2022

Under section 7 of the Insolvency and Bankruptcy
Code, 2016

In the matter of

IDBI Trusteeship Services Limited

[CIN: U65991MH2001GOI131154]

Asian Building, Ground Floor, 17, R. Kamani marg,
Ballard Estate, Mumbai – 400001, MH.

... Financial Creditor /Petitioner

Versus

Radius and Deserve Builders LLP

[LLP No: AAA – 5895]

One BKC, A-Wing 1401, Plot No. C-66, G Block,
Bandra Kurla Complex, Bandra (East), Mumbai –
400051.

... Corporate Debtor /Respondent

Order Delivered on 23.09.2022

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Umair A. Ansari, Counsel.

For the Corporate Debtor : Mr. Anit Soni, Counsel.

ORDER

Per: Justice P. N. Deshmukh, Member (Judicial)

1. This Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **IDBI Trusteeship Services Limited** ("the Financial Creditors/ ITSL"), seeking to initiate

Corporate Insolvency Resolution Process (CIRP) against Radius and Deserve Builders LLP ("the Corporate Debtor/ RDB LLP").

2. The present Petition was filed on 28.02.2012 before this Adjudicating Authority on account of default in repayment of Rs.302,00,00,000/- (Rupees Three Hundred and Two Crore Only).
3. The total amount claimed to be in default by the Financial Creditor is as follows (as per part IV of the Form 1):

Particulars	Principal (in INR)	Redemption Premium (19.26%)	Default interest (INR)	Total (INR)
DTD 1	302,00,00,000	529,60,00,000	372,57,75,567	1204,17,75,567

The date(s) of default stated to be as follows (as per part IV of the Form 1):

Date(s) of Default	Relevant Entity
Consent Terms	
15.04.2021 and 15.10.2021	Sanjay Chhabria, and thus RDL DPL (and, by extension the Corporate Debtor)
Options Agreement	
29.09.2020	The Corporate Debtor
DTDs	
31.01.2020	RDL DPL (and, by extension the Corporate Debtor)

4. The Corporate Debtor has its registered office at Mumbai. Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by the Financial Creditor:

Factual Background:

5. The Corporate Debtor has a debt due to the Financial Creditor under the Debenture Trust Deed dated 15.09.2015 (“**DTD**”) read with the Options Agreement dated 14.09.2015 (“**Options Agreement**”) and has defaulted in the payment of such debt.
6. On or around 14.09.2015, the Corporate Debtor and Radius & Deserve Land Developers Private Limited (“**RDLDP**”) entered into the abovementioned Options Agreement under which RDLDP had the option, but not an obligation, to purchase FSI on a land parcel being developed by the Corporate Debtor in Kurla (“**RDB Property**”) on such terms and conditions as set out in the Option Agreement, including payment of an option deposit of Rs.220,00,00,000 (Rupees Two Hundred and Twenty Crores Only) within a period of 60 months. [*For Option Agreement ref. to Annexure XV pages 487 to 503, Volume IV of the Petition*]
7. Further the terms of the Options Agreement stated that, if the option to purchase was not exercised by RDLDP within 60 months, the consideration amount of Rs.220 crores was to be refunded by the Corporate Debtor within 15 days.
8. As per Clause 3.1 of the Option Agreement, upon its execution, RDLDP paid the Corporate Debtor an interest free deposit of Rs.70,50,00,000/-. RDLDP was further required to pay an aggregate of 50% of the option deposit amount within 6 months from 14.09.2015 (i.e. by March, 2016) and balance 50% of the option deposit amount within further 6 months (i.e. by September 2016).
9. It is the undisputed position that RDLDP paid the consideration of Rs.220,00,00,000 (Rupees Two Hundred and Twenty Crores)

(“**Deposit Amount**”) to the Corporate Debtor under the Options Agreement. As per the financial statements of RDL DPL for the financial years 2016-17 and 2017-18, there is an "option deposit" of Rs.200,35,00,000 which is given by RDL DPL to the Corporate Debtor. As per the financial statements of RDL DPL for year ending 31.03.2018, a further amount of Rs.40,50,00,000/- has been given to Corporate Debtor in the financial year 2017-18. Accordingly, the financial statement for the financial year 2017-18 and the balance sheet of RDL DPL for the year 2018-19 reflects an outstanding balance of Rs.240,85,00,000/- towards the option deposit given to Corporate Debtor. [*Financial statement of RDL DPL for FY 2016-17 is at Annexure XVI page 504 to 507, Volume IV of the Petition*] [*Financial statement of RDL DPL for FY 2017-18 is at Annexure XVII page 508 to 510, Volume IV of the Petition*] [*Financial statement of RDL DPL for FY 2018-19 is at Annexure XVIII pages 511 to 513, Volume IV of the Petition*]

10. As referred to hereinbelow, the Corporate Debtor was obliged to return the Deposit Amount to RDL DPL under the terms of the Options Agreement in the event that RDL DPL chose not to exercise its option to purchase the FSI. The Corporate Debtor has defaulted on this obligation. RDL DPL has also defaulted under the terms of the DTD. This is also not disputed. Since amounts are owed to RDL DPL under the Options Agreement, the Financial Creditor, who has a charge over the dues under the terms of the DTD, has a right to recover the amounts from the Corporate Debtor and be substituted under the Options Agreement in place of RDL DPL. Despite being liable to pay the Financial Creditor under the scheme of the aforesaid agreements, the Corporate

Debtor has defaulted in its obligations. This is the trigger for the present Petition.

11. It is the undisputed position that no option was exercised by RDLDPPL for the purchase of RDB Property (as defined under the Options Agreement) within 60 months of the date of the Option Agreement i.e., by 14.09.2020. Hence, in terms of Clause 5.1 of the Option Agreement, the Corporate Debtor was obligated to return the amount of Rs.220 crores to RDLDPPL and/or the Financial Creditor within 15 (fifteen) days i.e., by 29.09.2020. However, the Corporate Debtor failed to repay the amount of Rs.220 crores to RDLDPPL by 29.09.2020, which remains in default till date.

Issuance of NCDS and Disbursements:

12. Originally, in and around the time of execution of the Options Agreement, RDLDPPL, a group company of the Corporate Debtor proposed to develop a Project on the Project Property (*as defined in the Petition*). To finance the construction of the Project, in 2015, RDLDPPL availed credit facilities from India Infoline Finance Limited (“IIFL”). However, for the purpose of the present Petition, the total facilities availed by RDLDPPL is Rs.302,00,00,000 (Rupees Three Hundred and Two Crores).
13. RDLDPPL and ITSL (acting on behalf of *inter alia* IIFL as a trustee) entered into the DTD [*Annexure VIII pages 144 to 280, Volume II of the Petition*]. The DTD was executed between RDLDPPL, ITSL, Radius Developers LLP, Sanjay Chhabria and Santosh Sarada for the issuance of secured, redeemable, non-convertible debentures (“NCDs”) of a total aggregate value of Rs.315 Crores. However,

RDL DPL only issued 3020 secured, non-convertible debentures of Rs.10 lakhs each amounting to Rs.302 crores in September 2015 to February 2016. The debt under the DTD was secured by Security created and more particularly explained in the DTD.

14. Pursuant to the issuance of the NCD, an amount of Rs.302,00,00,000 (Rupees Three Hundred and Two Crores) was disbursed to RDL DPL in five tranches, *inter alia* on 18.09.2015 (Series A), 20.09.2015 (Series B), 02.11.2015 (Series C), 23.12.2015 and 26.02.2016 (Series D & E), the details of which are more particularly set out in the Petition. [*ref. to Annexure XXXIII page 610, Volume IV of the Petition*]
15. *Vide* agreement dated 20.10.2018 (hereinafter referred to as “**DTD Amendment Agreement**”), the DTD was amended [*Annexure IX pages 281 to 397, Volume III of the Petition*].

Various Defaults:

16. The DTD read with DTD Amendment Agreement there were defaults in relation to the payments due towards the NCDs thereunder.
17. Due to the failure to make payment under the DTD, the Financial Creditor had issued a default notice dated 31.01.2020. ITSL also issued default and/or invocation notices for default of the Radius Developers LLP, Sanjay Chhabria and Santosh Sarma under the other facility documents. [*For letters dated 31.01.2020 ref to Annexures XXVIII, XXIX, XXX, and XXXI, pages 593 to 605, Volume IV of the Petition*].

18. The Financial Creditor initiated proceedings against *inter alia* RDLDP and the Corporate Debtor under Section 9 of the Arbitration and Conciliation Act 1996 for interim reliefs. Subsequently ITSL, RDLDP, Radius Deserve LLP, Sanjay Chhabria, Santosh Sarda, the Corporate Debtor, Wizard Infracon Private Limited and Astoria Homes LLP entered into Consent Terms on 29 January 2021 (“**Consent Terms**”) in Commercial Arbitration Petition (L) No. 5939 of 2020, Commercial Arbitration Petition (L) No. 5942 of 2020 and Commercial Arbitration Petition (L) No. 5945 of 2020. [*For the Consent Terms along with the order dated 29.01.2021 of Hon’ble Bombay High Court taking on record the Consent Terms, ref to Annexure XIX and Annexure XX, pages 514 to 555 and 556 to 559, respectively, Volume IV of the Petition*].
19. Despite entering into the Consent Terms before the Hon’ble Bombay High Court, no amounts have been paid under the Consent Terms on the dates as set out therein. The first default date under the Consent Terms is 15.04.2021. Subsequently, the defaults in payments also occurred on 15.10.2021 and 15.04.2022.
20. Due to the default under the Consent Terms, in accordance with Clauses 13 and 14 thereunder, the rights and remedies available to the Financial Creditor under the Financing Documents (including the DTD) continue unamended.

Maintainability of the Petition:

21. It is submitted that in terms of Clause 13 and 14 of the Consent Terms, on the occurrence of a single default under the Consent Terms, the rights of ITSL under the DTD would continue as if the

same were not waived, amended, amended and restated or modified by these Consent Terms or documents executed pursuant to these Consent Terms. ITSL would be entitled to enforce such rights and remedies, as available to it under the Financing Documents, which includes the DTD.

22. The relevant clauses of the Consent Terms are reproduced hereinbelow:

“2... (The DTDs, Share Pledge Agreement, CG, PGs, DPN 1 and DPN 2 and any other document as may be designated as a financing document by ITSL including the escrow agreements entered into pursuant to the DTDs unless referred to individually, shall collectively be referred to as "Financing Documents")”

(emphasis supplied)

“13. It is agreed, confirmed, declared and undertaken that on occurrence of any default in payment or a covenant default of these Consent Terms, the rights and remedies of ITSL under the Financing Documents would continue as if they had not been waived, amended, amended and restated or modified by these Consent Terms or documents executed pursuant to these Consent Terms, and ITSL shall be entitled to enforce such rights and remedies, as available to it under the Financing Documents for inter alia the entire Settlement Amount alongwith Default Interest inter alia against the Existing Securities.”

(emphasis supplied)

“14. It is agreed, confirmed, declared and undertaken that on occurrence of a single default in payment or a covenant default of these Consent Terms, the rights and remedies of ITSL under the Financing Documents would continue as if they had not been

waived, amended, amended and restated or modified by these Consent Terms or documents executed pursuant to these Consent Terms, and ITSL shall be entitled to enforce such rights and remedies, as available to it under the Financing Documents for inter alia the entire SC Additional Obligation alongwith Default Interest thereon inter alia against the Additional Security (to the extent of the outstanding SC Additional Obligation and Default Interest thereon)."

(emphasis supplied)

23. The repayment schedule for Sanjay Chhabria's obligations under the Consent Terms was as follows,

Sr. No.	Repayment date	Amount
1.	April 15, 2021	40,00,00,000
2.	October 15, 2021	40,00,00,000
3.	April 15, 2022	40,00,00,000
4.	October 15, 2022	40,00,00,000
5.	April 15, 2023	40,00,00,000
Total		200,00,00,000

24. However, Sanjay Chhabria failed to make payment on the respective due dates of 15.04.2021 and 15.10.2021 under the Consent Terms. Therefore, in terms of Clause 13 of the Consent Terms the rights and remedies available to ITSL under DTD 1 were restored and ITSL had the right to recover from RDLDP the entire outstanding amount under DTD 1 as on 17.01.2022 i.e., Rs.1204,17,75,567/- (Rupees One Thousand Two Hundred and Four Crores Seventeen Lakhs Seventy-Five Thousand Five-Hundred and Sixty-Seven Only) ("**Outstanding Amount**")

The Financial Creditor's charge:

25. The following terms and conditions of the DTD 1 are relevant for the purposes of this submission:

“12. SECURITY

12.1 The Redemption Amount payable by the Issuer and the Amounts Due shall be secured by creation of the Security Interest in favour of the Debenture Trustee for the benefit of the Debenture Holders and other Secured Parties and shall be created and perfected in accordance with this Trust Deed and be in full force and effect, inter alia by:

...

(b) An exclusive charge on Other Assets (defined hereinafter) identified in Schedule III in the manner provided in this Deed; and

...”

(emphasis supplied)

“23 EVENTS OF DEFAULT AND REMEDIES

23.1 REMEDIES

Upon the occurrence of any of the events specified in Clause 23.2 below (each, an "Event of Default"), the Debenture Trustee on the directions and instructions of the Facility Agent / Debenture Holders for and on behalf of the Secured Parties shall exercise, in addition to all other powers conferred upon it in terms of this Trust Deed, the following rights namely:

...

23.1.2. without any further notice(s) of any kind and for this purpose the Debenture

Trustee will be entitled to call upon the Issuer to redeem the Debentures, and the Debenture Holders/ Debenture Trustee shall thereupon have the right to exercise any and all rights specified in the Debenture Documents including without limitation enforce and/or instruct the Debenture Trustee to enforce the Security created under the Debenture Documents.”

“23.2 EVENTS OF DEFAULT

The occurrence of any one or more of the following events shall constitute an Event of Default:

...

23.2.1 default is committed in payment of any Redemption Amount or Amounts Due payable by the Issuer on the due date/Redemption Date i.e. the amount payable is not cleared after 1 (one) Business Days of being payable...”

26. Further the definition of Other Assets under Schedule III of DTD 1 is as follows:

“... (iii) **All right, title, interest, benefits, claims and demands whatsoever of the Issuer in the Project and the Project Agreements** and all right, title, interest, claims and demands whatsoever of the Issuer in, to, under and in respect of the monies lying in the Escrow Account and in all funds from time to time deposited therein or elsewhere in accordance with the terms of the Escrow Account Agreement or other securities representing all amounts credited to the Escrow Account and **all other receivables, monies, benefits, rights (whether monetary or otherwise) arising out of/available to the Project or Project Agreements including but not limited to the insurance proceeds whether deposited in the Escrow Account or otherwise (hereinafter referred to as the "Other Assets").**”

(Emphasis supplied)

““Project Agreements” means the **agreements relating to sale, lease of the units of the Mortgaged Properties, all the construction contracts, agreements, contracts, sub-contracts, purchase orders and arrangements**

entered by or on behalf of the Issuer or its group concerns with various third parties for and in relation to the Project or otherwise and the other Mortgaged Properties, any contractor guarantees, all guarantees, performance guarantees, liquidated damages, performance bonds and letters of credit that may be provided by any counter party in relation to any such development agreements, construction contracts, agreements, contracts, sub-contracts, purchase orders, any of the development agreements or arrangements, entered by or on behalf of the Issuer with various third parties and in relation to the development of the Project.”

(Emphasis supplied)

27. Under Clause 12 of the DTD, the Financial Creditor has a floating charge over the assets and revenue of RDLDPPL including an exclusive charge on the Other Assets identified in Schedule III of DTD. Other Assets includes “all right, title, interest, benefits, claims and demands whatsoever of the Issuer in the Project and the Project Agreements.” in relation to all other receivables, monies, benefits, rights (whether monetary or otherwise) arising out of / available to the Project or Project Agreements including but not limited to the insurance proceeds whether deposited in the Escrow Account or otherwise.
28. Under the DTD, the definition of Project Agreements, includes all agreements entered into by the Issuer (being RDLDPPL) with various third parties, whether in relation to the Project or otherwise.
29. Therefore, the Options Agreement, being entered into by RDLDPPL with the Corporate Debtor would fall within the definition of the Project Agreements under the DTD. The Options

Agreement being a Project Agreement, any monies due and receivable under the same to RDL DPL is subject to the Financial Creditor's charge.

30. Upon the occurrence of the event of default i.e., default in payment of any Redemption Amount or Amounts Due, the Financial Creditor has the right to enforce the Security under the DTD including charge over the RDB Deposit amount.
31. As such, for the reasons mentioned in this section and in particular in paragraphs hereinabove, the Financial Creditor has the right to recover the RDB Deposit amount from the Corporate Debtor.

Financial Creditor's right to step into the shoes of RDL DPL under the Options Agreement:

32. Since the Corporate Debtor failed to exercise the option of purchase under the Options Agreement from RDL DPL, the money advanced by RDL DPL was to be refunded. Hence, such advance of amounts under the Options Agreement, being a conditional sale agreement, is akin to commercial effect of borrowing, and in turn a financial debt. Reliance is placed by the Financial Creditor on *Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.*, (2019) 8 SCC 416.
33. In view of the terms of the Consent Terms, upon an event of default, the rights of the Financial Creditor under the DTD stand restored. In terms of Clause 23.1 read with 23.2 of the DTD, if there is an event of default, the Financial Creditor has a right to substitute RDL DPL in the Project Agreements, including the Options Agreement.

34. As the Financial Creditor has substituted RDL DPL vis-a-vis the Options Agreement, the money advanced and to be refunded from the Corporate Debtor under the Options Agreement is payable to the Financial Creditor. Therefore, the Financial Creditor is a 'financial creditor' of the Corporate Debtor within the meaning of the Code.

Shared management and shareholding between RDL DPL and the Corporate Debtor:

35. The Corporate Debtor dominates and controls RDL DPL and there is a significant overlap between the directors and partners of the two entities. The shareholding pattern is co-mingled due to cross holdings by the group companies and persons. To demonstrate the cross-shareholding pattern as on 31 March 2020, the shareholding chart of RDL DPL is reproduced below [*Shareholding pattern of RDL DPL is at Annexure III page 90 to 100, Volume I of the Petition*]

Name of Shareholder	No. of shares (as on 31 March 2020)	Percentage of shares held (as on 31 March 2020)
Radius Developers LLP	24,50,000	49%
Mr Sanjay Chhabria	50,000	1%
Santosh Sarda	25,00,000	50%

Further, the financial statements of the Corporate Debtor for the financial year 2018-19 shows the partners of the Corporate Debtor are as follows [*Annexure IV page 111 to 132, Volume I of the Petition*]

Partner	Profit Sharing Ratio	Loss Sharing Ratio	Shareholders/ director of the Partner
Aaditri Construction Private Limited	98.98%	99%	Mr. Sanjay Chhabria Mr. Anil Chhabria
Mr Sanjay Chhabria	1%	1%	NA
Deserve Exim Private Limited	0.01%	0%	Mr Santosh Sarda and Mr Utkarsh Sarda
Wadhavali Private Limited	0.01%	0.00%	Mr Santosh Sarda and Mr Manish Sarda

36. Further, the statement of Radius Developers LLP enclosed with the Annual Returns for the financial year ending on 31 March 2021 in LLP Form No 11, filed with the MCA, the partners of the Corporate Debtor are: (1) Sanjay Chhabria (2) Ritu Sanjay Chhabria [*Annual Returns for 31 March 2021 is at Annexure V, page 133 to 140, Volume II of the Petition*]
37. Undisputedly, and as submitted by the Corporate Debtor, it is under the control of the control of Mr. Sanjay Chhabaria.
38. In addition to the submissions above with respect to a default by the Corporate Debtor on a conjoint reading of the DTD, Options Agreement and Amended DTD Agreement, it is alternatively submitted that the Corporate Debtor is a group company of and/or an alter ego of RDLDP. The latter is a mere instrumentality of the Corporate Debtor. The business activities of the Corporate Debtor and RDLDP are inextricably interlinked and intertwined. There is immense interdependence amongst each

other. Further, the Corporate Debtor and RDLDPPL operate as a single economic entity. As such, a default by RDLDPPL is a default by the Corporate Debtor and *vice-versa*.

Conclusion:

39. In light of all the submissions made above, it is submitted that the Petition ought to be admitted as meet the requirements of the Code of the existence of a debt due to the Financial Creditor and a consequent default.
40. In support of its case the Financial Creditor also relies upon the following case laws filed by way of compilation on record.
- i. *Cheran Properties Limited v. Kasturi and Sons Limited and Others*, (2018) 16 SCC 413, paragraphs 25;
 - ii. *Fernas Construction Co. Inc. v. ONGC Petro Additions Limited*, 2019 SCC OnLine Del 8580, paragraphs 19 and 23;
 - iii. *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Ors.*, (2018) 15 SCC 678, paragraphs 24 – 26;
 - iv. *Mahanagar Telephone Nigam Ltd v. Canara Bank & Anr.*, (2020) 12 SCC 767 paragraph 10;
 - v. *Shapoorji Pallonji and Co. Private Limited v. Rattan India Power Limited and Anr.*, 2021 SCC Online Del 3688 paragraphs 21 to 40.
41. It is observed from the records that Corporate Debtor has been given multiple opportunities to appear before this Tribunal and plead his case. The Corporate Debtor appeared on first date of listing of matter i.e. 02.03.2022 and undertook to file reply.

Thereafter matter was listed on 18.04.2022, the Corporate Debtor chose not to appear on that date, This Tribunal granted last opportunity to file reply and matter was stand over to 13.06.2022. Subsequently, on 13.06.2022 matter was adjourned to 30.06.2022 due to paucity of time. On 30.06.2022, Adv. Vibhav Krishna appeared and requested for further time to file reply however the request was not acceded by the Tribunal and matter was considered on its merits. Ld. Counsel for the Corporate Debtor chose not to file reply on record instead advanced oral arguments. upon making oral submissions the Corporate Debtor was granted liberty to file written submissions within two weeks from 30.06.2022, the Corporate Debtor has complied with the aforesaid order. Therefore, this Bench taken on record the written submission of the Corporate Debtor.

42. The NCLT is required to consider the preliminary objection to the Petition and also to the objection on merits to the reliefs prayed in the petition in the background of clauses of the Consent Terms dated 29.1.2021 annexed at Exhibit on Page 514-555.
43. *The Corporate Debtor opposed the reliefs prayed by the Petitioner on the following grounds:*

A. The Petition is not maintainable on the basis of Consent Terms dated 29.1.2021

- a. The Consent terms is dated 29.1.2021. The Petition has been filed on 24.1.2022.
- b. The Petition has been filed on the basis of default notice dated 31.1.2020 which is prior to the consent terms dated 29.1.2021.

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- c. The Petition is contrary to the pleadings filed by the parties in Commercial Arbitration Petition No. 1 of 2020 filed on 23.7.2020 at High Court Bombay, Affidavit in Reply dated 9.8.2020 filed by Radius and Deserve Land Developers Pvt Ltd, the Respondent No. 1 therein, Affidavit in Reply dated 9.8.2020 filed by Radius and Deserve Builders LLP, the Respondent No. 5 therein. Affidavit in Rejoinder dated 24.8.2020, Orders passed by High Court Bombay and the Consent Terms dated 29.1.2021.
- d. The claim under IBC cannot be maintained in view of the compromise, settlement of dispute in relation to financing documents under the Consent terms dated 29.1.2021.
- e. The Consent Terms have provided the consequence of default and default of clauses of the consent terms dated 29.1.2021 cannot be the basis for initiating CIRP process against the Corporate Debtor interalia on the basis of the clauses of the Consent Terms.

2. The Petitioner and the Respondent agree and undertake that by these Consent Terms, the parties have amicably resolved, compromise and mutually settled their disputes out of court arising out of and in relation to:

- a. *DTD 1*
- b. *Debenture Trust Deed dated 7th December, 2017 executed between Radius, Radius LLP, Sanjay Chabbria and Santosh Sarda and ITSL (hereinafter referred to as “**DTD 2**”) for secured, redeemable, NCDs of a face value of Rs.1,00,000/- (Rupees One Lakh only) each, of the aggregate value of Rs.100,00,00,000/-*

*(Rupee One Hundred Crore only) (hereinafter referred to as the “**Debentures 2**”)*

- c. *Debenture Trust Deed dated January 5, 2018 executed between Radius, Radius LLP, Sanjay Chhabria, Santosh Sarda and ITSL (hereinafter referred to as “**DTD 3**”) for secured, redeemable, NCDs of a face value of Rs.1,00,000/- (Rupees One Lakh only) each, of the aggregate value of Rs.15,00,00,000/- (Rupees Fifteen Crore only) (hereinafter referred to as “**Debentures 3**”)*
*(The DTD 1, DTD 2 and DTD 3 unless referred to individually, shall be hereinafter collectively referred to as the “**DTDs**”)*
- d. *Share Pledge Agreement of even date executed by Sanjay Chhabria, Santosh Sarda and Radius LLP (in their capacity as shareholders of the Company) in favour of the Debenture Trustee (“**Share Pledge Agreement**”);*
- e. *Deed of Guarantee of even date executed by Radius LLP in favour of the Debenture Trustee (“**LLP Guarantee**”);*
- f. *Deed of Guarantee of even date executed by Sanjay Chhabria and Santosh Sarda in favour of ITSL (“**PG I**”);*
- g. *Demand Promissory Note of even date executed by Sanjay Chhabria and Santosh Sarda in favour of ITSL which forms a part of PG-Sanjay I and PG-Santosh I (“**DPN 1**”);*
- h. *Demand Promissory Note of even date executed by Radius LLP in favour of ITSL which forms a part of LLP Guarantee (“**DPN 2**”); and*
- i. *Deed of Guarantee dated December 13, 2017 executed by Sanjay Chhabria and Santosh Sarda in favour of ITSL (“**PG II**”).*

5. *The Petitioner and Respondents have amicably resolved, compromise and mutually settled their disputes out of court arising out of and in relation to the Financing Documents and have entered into and executed these consent terms (“Consent Terms”).*

6. *It is agreed, declared, confirmed and undertaken that the entire disputes between the parties arising out of or in relation to the Financing Documents, is settled for payment of Rs.750,00,00,000/- (Rupees Seven Hundred and Fifty Crores) (“Settlement Amount”) payable to ITSL in the following manner....*

10. *It is agreed, confirmed, declared and undertaken that if Radius, Radius LLP, Sanjay Chhabria, Santosh Sarda, Wizard or Astoria failed to execute the agreements as provided in these consent terms within 30 days from the date of the Order being passed by this Hon’ble Court (or such further time as may be granted by ITSL by way of a written extension), the properties that have been furnished as securities in favour of ITSL, under the financing documents including the property mentioned in Annexure A hereto, the personal assets of Sanjay Chhabria and Santosh Sarda and the additional security (additional security to the extent of the outstanding SC additional obligation and default interest accrued on SC additional obligation (as defined below) shall automatically stand attached and the attachment shall remain in force until full and complete accord, satisfaction and discharge of the entire settlement amount along with default interest under the financing documents.*

Default

11. It is agreed, declared, confirmed and undertaken that in the event of default by Radius, Sanjay Chhabria and/or Santosh Sarda in making payment of any instalment(s) provided in Annexure-B and Annexure-C herein, on the respective due date(s), then,

a. If default pertains to an installment of Radius obligation then ITSL shall be entitled to default interest at 18% pa till repayment of the installment of Radius obligation jointly and severally by Radius, Sanjay Chhabria, Santosh Sarda and Radius LLP. It is clarified that any payment made by the obligors will first be adjusted towards the outstanding default interest and thereafter towards the principal installment or part thereof which first fell due and is outstanding.

b. If default pertains to an installment of SC additional obligation then ITSL shall be entitled to interest at 18% per annum till repayment of the installment of outstanding SC Additional obligation by Sanjay Chhabria. It is clarified that any payment made by Sanjay Chhabria will first be adjusted towards the outstanding Default interest and thereafter towards the principal installment or part thereof which first fell due and is outstanding. (the interest of 18% p.a. shall be referred to as "Default interest")

c. The personal assets of Sanjay Chhabria and Santosh Sarda shall automatically stand attached and the same shall remain in force until full and complete accord, satisfaction and discharge of the entire outstanding under these consent terms.

d. all the properties that have been furnished as securities in favour of ITSL under the Financing Documents and the Additional Security (the additional security shall be attached to the extent of the outstanding SC obligation along with default interest accrued

thereon) shall automatically stand attached and the attachment shall remain in force until full and complete accord, satisfaction and discharge of the entire outstanding under these consent terms.

e. ITSL will have the right to sell or otherwise deal with, in any manner as it deems fit any attached property ...

f. ITSL will have the right to sell or otherwise deal with, in any manner as it deems fit the additional security ...

g. Acceleration ...

(ii) In the event there are 2 consecutive defaults in repayment of the principal instalments or default interest or any part thereof, of the SC additional obligations as specified in Annexure C on the respective due date (s), Sanjay Chhabria shall make payment within thirty (30) calendar days from the date of such consecutive default. In the event the default (including any default interest) is not cured and the entire principal instalments along with the interest thereon has not been paid within 30 days, the entire outstanding SC additional obligation shall forthwith become due and payable. From such date, default interest @ 18% p.a. will be charged on the entire recalled amount till repayment of the entire outstanding SC additional obligation...

15... ITSL and/or the debenture holders will have the right to attach, sell or otherwise deal with the additional security for the entire outstanding SC additional obligation and default interest thereon.

41. The parties agree, confirm and declare that all covenants and undertakings herein above given by the parties are undertakings given to this Hon'ble Court and they are independent of any obligations that the obligors and Radius LLP have under the financing documents as modified by these consent terms.

42. It is agreed, declared, confirmed and undertaken by the parties that the entire dispute between the parties arising out of or in relation to financing documents is settled, resolved and compromised, in terms of and as set out in these consent terms. The parties agree to withdraw, give up all their objections and complaints whatsoever and howsoever against each other subject to these consent terms.

- f. The dispute under the financing documents was duly settled under the Consent terms and the consequence of default has been provided under the Consent Terms and the consent terms did not contemplate initiating CIRP process against the Corporate Debtor for default in compliance of clauses of consent terms. The default of clauses of Consent Terms cannot form a basis for initiating CIRP process against the Corporate Debtor.
- g. There are specific remedy available to the Financial Creditor under the Consent terms which has not been availed by the Financial Creditor. Reliance is placed on the following judgements: -
- (i) Essar Judgement by NCLT Ahmedabad Bench dated 8.3.2019 reported at 2019 SCC Online NCLT 750, paras 8 and 9.
 - (ii) Committee of Creditors of Essar Steel India Limited Vs. Satishkumar Gupta and Ors. (2020) 8 SCC 531.

- (iii) Eddleweiss Asset Reconstruction Company Vs. Winsome Yarns Limited NCLT Chandigarh Bench, CP (IB) No.291/CHD/201A (paras 28, 29)
 - (iv) Srikanta Sarda Vs. Tansway Marketing Pvt.Ltd., NCLT Kolkatta Bench in (CP) (IB) 400/KB/2017.
 - (v) Dharamratnakara Rai Bahadur Arcot Narainswami Mudaliar Chattram Vs. Bhaskar Raju & Brothers (2020)4 SCC 612 para 18.
 - (vi) M.Venkataramanna M. Hebbar (Dead) by LR Vs. M.Rajgopal Hebbar (2007) 6 SCC 401.
 - (vii) Mangalam Vanijya Private Limited Vs. Reward Business Solutions 1167/ IBC/ NCLT/ MB/MAH/ 2020.
- h. The Petition discloses that Consent Terms dated 29.1.2021 was executed between the parties. In view of the clauses of the Consent Terms, the dispute stands resolved. Default of terms of Consent Terms cannot be treated as “*a debt*” and “*an event of default*” and does not complied with the requirement of Section 7 of the IBC Code. The relevant clauses of the Consent Terms are as under:
- i. The cause of action pleaded for filing the present Petition are subject matter of the Consent Terms dated 29.1.2021

and therefore, the Petitioner cannot be permitted to reagitate the contentions of the Consent Terms in the present petition.

B. Default of clauses of Consent terms is not a basis for IBC Claim

- a. The dispute pertains to financing documents.
- b. The dispute on financing documents was settled, compromised and resolved under consent terms dated 29.1.2021 in Commercial Arbitration Petition (L) No. 5939 of 2020
- c. Default of the clauses of Consent Terms cannot be basis for instituting and maintaining a petition under IBC
- d. In view of the clauses of the Consent Terms dated 29.1.2021 the mere fact of default in compliance of conditions under financing documents cannot be construed as existence of debt and default so as to admit a petition under IBC Code
- e. In view of the Consent Terms dated 29.1.2022 there is no subsisting demand or claim under Form 3 of IBC Code which is the prerequisite for initiating proceedings under IBC Code.
- f. Claim under Consent Terms cannot be basis for initiating CIRP process against the Corporate Debtor

C. Dispute does not fall under the provisions of definition of 'Corporate Debtor' under the IBC:

a. **Absence of Privity of Contract:** It is submitted that the Corporate Debtor herein does not fall under the definition of a 'Corporate Debtor' as stipulated under the IBC. It is the Petitioner's case as stated in *paragraph 5, Pg.32, Petition* that the Respondent's liability is co-extensive with that of RDL DPL and therefore, the Corporate Debtor is liable to make payment of outstanding amounts purportedly due to the Petitioner. The aforesaid allegation of the Petitioner is false, incorrect and made with sole profit-making motives. It is submitted that the Petitioner throughout the Petition had relied upon the following financing documents which give rise to the Petitioner's alleged claim:

- i. DTD 1;
- ii. SPA 1;
- iii. Debenture Trustee Agreement;
- iv. Debenture Trust Deed Amendment Agreement dated 20th October 2018;
- v. Guarantee by Radius Developers LLP dated 15th September 2015;
- vi. Personal Guarantees by Mr. Sanjay Chhabria and Mr. Santosh Sarda dated 15th September 2015.

It is pertinent to note that the Corporate Debtor herein is not a party to even a single of the abovementioned financing documents. All the above documents have been executed only with RDL DPL and other obligors mentioned therein and not with the Corporate Debtor herein, hence by no stretch of imagination can it be assumed that the Corporate Debtor herein is in any way

connected to the transaction between the Petitioner and RDL DPL. Further, neither was the Corporate Debtor a guarantor at any given point in time, therefore it is ludicrous to assume that despite being completely unrelated to the transaction in question, the Corporate Debtor is being made a 'Corporate Debtor' under the IBC. It is submitted to fall under the provisions of the IBC, the Corporate Debtor herein must owe a debt to the Petitioner. However, when the Corporate Debtor never transacted with the Petitioner only as evident from the financing documents hereinabove it is impossible to fathom that the Corporate Debtor is being dragged into IBC proceedings as a Corporate Debtor. The Corporate Debtor does not owe any debt or amount to the Petitioner.

This is demonstrated by the extract of relevant dates and events as set out hereinbelow.

- i. 14th September 2015*: An Options Agreement was executed between the Corporate Debtor and Radius & Deserve Land Developers Pvt. Ltd. ("**RDL DPL**") @Pg.487, *Petition*. As stated in Recital B of the Options Agreement dated 14th April 2015 ("**Options Agreement**"), the Corporate Debtor acquired the rights to develop a Slum rehabilitation Schemeadmeasuring in aggregate 53,192.35 square meters and comprising of (i) land admeasuring 29,589 square meters claimed by OM Ganesh Nagar SRA Co- operative Housing society, (Proposed) (ii)

land admeasuring 17,882 square meters claimed by Ekta Co-operative Housing society (Proposed) and (iii) land admeasuring 5720.75 square meters claimed by Jai Hanuman Nagar SRA Co-operative Housing society (Proposed) bearing survey No.103 Pt, CTS No.200 Pt. lying and situate at village, Wadhwali, Taluka Kurla (“**WadhwaliProject**”)@Pg.488, Petition. Vide the Options Agreement, the Corporate Debtor was desirous to grant RDLDPDPL an option to purchase Option FSI in the Wadhwali Project. The parties agreed that the Corporate Debtor shall grant and RDLDPDPL shall acquire an option but not the obligation to purchase the Option FSI for the consideration and in accordance with the terms and conditions agreed herein @Pg.489, Petition.

Submission: The Corporate Debtor submits that the Petitioner is not a party to the Options Agreement. Further, the Options Agreement is not and cannot be a financing document and deals with grant of option to purchase Option FSI in the ‘Wadhwali Project’.

- ii. 15th September 2015: Debenture Trustee Agreement executed between RDLDPDPL as the Issuer, and the Petitioner as the Debenture Trustee @Pg.80, Petition. Recital A of the said Agreement records that RDLDPDPL proposes to issue debentures on a private

placement basis for the construction and development of the Borivali Project by borrowing funds by way of issuing various series of Long Term Secured Redeemable Non-Convertible Debentures of the Face Value of Rs. 10 lakhs each for an aggregate amount not exceeding the limit of Rs.315 Crores @Pg.83, Petition. Vide the said Agreement, the Petitioner was appointed as the debenture trustee for all the debenture holders (Clause 1) @Pg.84, Petition.

Submission: The Corporate Debtor submits that they are not a party to the above said Debenture Trustee Agreement dated 15th September 2015 (“**Debenture Trustee Agreement**”).

- iii.* 15th September 2015: Debenture Trust Deed dated 15th September 2015 (“**DTD 1**”) executed among (i) the Petitioner as debenture trustee; (ii) RDLDPL as the issuer; (iii) Radius Developers LLP, the LLP Guarantor; and (iv) Mr. Sanjay Chhabria & Mr. Santosh Sarda, personal guarantors @Pg.144, Petition. Recital A and Recital B of DTD 1 record that the said DTD 1 is being executed for the purpose of providing funds for the construction and development of a real estate project situated at land being Survey No. 48, Hissa No. 3 and Survey No. 50, Hissa No. 3, corresponding to CTS Nos. 262,

264, 264/1 to 7, 266, 268, 268/1, 269, 269/1 of village Magathane, Taluka Borivali, Balwadi, Teen Murti, Devipada Mitra Mandal, Borivali (E), Mumbai - 400 066 (“**Borivali Project**”) @Pg.149, Petition.

Submission: The Corporate Debtor is not a party to DTD 1. The Wadhwal Project is not the subject matter of DTD 1. The Corporate Debtor is not included in the definition of the term ‘Obligors’ under the DTD 1, and the definition of the term ‘Obligors’ is limited to the Issuer, the LLP Guarantor and the personal guarantors.

iv. 15th September 2015: Pursuant to DTD 1, Share Pledge Agreement dated 15th September 2015 (“**SPA 1**”) was executed among (i) RDL DPL as the issuer; (ii) the Petitioner as the debenture trustee; (iii) Mr. Sanjay Chhabria & Mr. Santosh Sarda as the Pledgors; and (iv) Radius Developers LLP as the Pledgor @Pg.398, Petition. The list of pledged shares are enumerated in Schedule I of SPA 1 @Pg.433, Petition.

Submission: The Corporate Debtor submits that they are not a party to SPA 1.

v. 15th September 2015: Guarantee was executed by Radius Developers LLP in favour of the Petitioner

pursuant to DTD 1 @Pg.444, Petition. Further, Personal Guarantees were also provided by Mr. Sanjay Chhabria and Mr. Santosh Sarda pursuant to DTD 1 for the purposes of securing its obligations @Pg.461, Petition.

Submission: The Corporate Debtor submits that no guarantee was ever issued by the Corporate Debtor herein obviously since the Corporate Debtor was not a part of the transaction between the Petitioner and RDLDP. There is not a single financing document which even mentions the Respondent's name. There is absolutely no privity of contract. Not even a single financing document has been executed between the Petitioner and the Respondent.

- vi. 11th February 2019: Letter addressed by a Debenture Holder, (“IIFL”) to RDLDP not the Corporate Debtor declaring an event of default in repayment of the allege due amounts under DTD 1 @g. 560, Petition.
- vii. 12th September 2019: Letter addressed by RDLDP to the Petitioner seeking an extension in repayment of the outstanding sums from 17th September 2019 to 17th September 2020 @Pg. 563, Petition. It is reiterated that the Corporate Debtor herein is not a party to the exchange of correspondence between the

Petitioner and RDLDPPL since the Corporate Debtor herein is not a party to the transaction between the Petitioner and RDLDPPL. There is no privity of contract.

- viii.* 12th September 2019: Letter addressed by the IIFL to RDLDPPL granting the extension for repaying the outstanding sum by 17th September 2020 @Pg.564, Petition. On the same day, the Petitioner also issued an NOC in favour of RDLDPPL granting the extension sought by the same @Pg.568, Petition. Additionally, the Petitioner also shared the term sheet for extension of the repayment schedule @Pg.569, Petition.
- ix.* 31st January 2020: Letter addressed by the Petitioner to RDLDPPL wrongfully declaring an event of default of failure to repay outstanding sums @Pg.593, Petition. The said letter was issued by the Petitioner in contravention to its own letters dated 12th September 2019 whereby the time period for repayment was extended to September 2020.In any case, the Corporate Debtor is not a party to this letter.
- x.* 29th January 2021: Consent terms were executed in Commercial Arbitration Petition (L) No.5939 of 2020, Commercial Arbitration Petition (L) No. 5942 of 2020 and Commercial Arbitration Petition (L)

No.5945 of 2020 @Pg.514. The relevant terms of the Consent Terms are dealt with in detail in the submissions hereunder.

Submission: The Consent Terms does not contain a single statement which creates an obligation on the Corporate Debtor herein to repay any sums on account of default by RDLDPDPL or its directors. Further, it is reiterated that the Corporate Debtor herein is not a party to the transaction between the Parties, namely, DTD 1.

xi. 24th January 2022: Captioned Petition filed by the Petitioner under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”).

b. **Misjoinder of Parties:**

The Corporate Debtor further submitted that it is the Petitioner’s own case that the financing documents were executed with RDLDPDPL and not with the Respondent. It is for this very reason that the declaration of event of default vide letter dated 31st January 2020 @Pg.593, Petition was addressed only to RDLDPDPL and not the Petitioner. It is extremely surprising that when the purported debt is apparently due from RDLDPDPL, the financing document were sent to RDLDPDPL, the declaration of default was made with respect to RDLDPDPL, the Petitioner has not filed the Petition against RDLDPDPL but against the Corporate Debtor herein who is completely unconnected to the

impugned transaction. It is submitted that RDLDP is separate corporate identity having separate CIN Number and the Corporate Debtor herein is a separate and independent corporate identity having LLP PAN Card. Therefore, if at all a petition has to be filed it can only be filed against RDLDP being the proper and necessary party and not the Corporate Debtor herein. In the present case the Corporate Debtor herein is simply a sister company of RDLDP and therefore, the captioned Petition is not maintainable against the Corporate Debtor herein. The aforesaid has been expressed by the Hon'ble NCLAT in *Anil Syal v. Sanjeev Kapoor (Proprietor Kapoor Logistics) & Anr., Company Appeal (AT) (Insolvency) No.961 of 2019*, wherein it was observed as under:

“...Thus, it is clear that the Corporate Debtor No 1 Applicant / ‘Operational Creditor’ has no right to claim dues, relating to the invoices issued against ‘M/s Flywheel Logistics Pvt. Ltd.’, from the corporate debtor M/s ‘Flywheel Logistics Solutions Pvt. Ltd.’ i.e. FLSPL, the Corporate Debtor No 2, which is a separate corporate entity, having different CIN Number...”

From the above, it is clear that the ‘right to claim’ (if any) can only arise from RDLDP and not the Corporate Debtor herein since no right to claim can be exercised against a corporate entity simply because it happens to be a sister concern of the alleged defaulter. A copy of the judgment in *Anil Syal’s Case* is hereto annexed and marked as **Annexure-A**.

c. *The Petitioner ‘cannot’ substitute itself in place of RDLDP*
L under the Options Agreement.

- i. The Corporate Debtor submits that it is the Petitioner’s case as stated @Pg.29, Petition that by virtue of Clause 13 and 14 of the Consent Terms dated 29th January 2021, the Petitioner’s right under the DTD 1 have been restored due to the default by RDLDP and its directors in repayment of the Settlement Amount as agreed in the Consent Terms. In order to justify its locus in the present matter, the Petitioner first relies upon Clause 19 more specifically Clause 19.1@Pg.30, Petition which states as under:

“Insolvency:

19. Notwithstanding anything contained in this Consent Terms, it is agreed, declared and undertaken that prior to payment of the entire Settlement Amount along with Default Interest, if Radius is admitted into corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (“Code”):

However, the Petitioner has deliberately been silent about the same Clause 19 just preceding Clause 19.1 which states as under:

“19.1 The entire Outstanding Amount (not limited to the Settlement Amount) under the Financing Documents will become due to ITSL and ITSL shall have the right to claim the Entire Outstanding Amount in such proceedings under the Code”

The said Clause 19 reveals that Clause 19.1 comes into effect only if RDLDP is under insolvency. However, in the present case, as far as this Corporate Debtor is aware, RDLDP is not under insolvency. Therefore, the Petitioner’s reliance upon Clause 19.1 is wholly misconceived and incorrect.

- ii. In order to further, justify its locus, the Petitioner @Pg.33, Petition relies upon Clause 12 of DTD 1 which states as under:

“12. SECURITY

..(b) An exclusive charge on the Other Assets (defined hereinafter) identified in Schedule III in the manner provided in this Deed; and...”

Definition of ‘Other Assets’ under Schedule III of DTD 1 is as follows:

“(iii) All right, title, interest, benefits, claims and demands whatsoever of the Issuer in the Project and the Project Agreements and all right, title, interest, claims and demands whatsoever of the Issuer in, to,

under and in respect of the monies lying in the Escrow Account and in all funds from time to time deposited therein or elsewhere in accordance with the terms of the Escrow Account Agreement or other securities representing all amounts credited to the Escrow Account and all other receivables, monies, benefits, rights (whether monetary or otherwise) arising out of/available to the Project or Project Agreements including but not limited to the insurance proceeds whether deposited in the Escrow Account or otherwise...”

Under DTD 1, ‘Project Agreement’ is defined as follows:

“...Project Agreements” means the agreements relating to sale, lease of the units of the Mortgaged Properties, all the construction contracts, agreements, contracts, sub-contracts, purchase orders and arrangements entered by or on behalf of the Issuer or its group concerns with various third parties for and in relation to the Project or otherwise...”

It is the Petitioner’s case as stated @paragraph 9, Pg.36, Petition that the Petitioner in light of the above, the Petitioner apparently has an exclusive charge on the monies, receivables from the Respondent herein including the Option Deposit Amount which was made by RDL DPL pursuant to the Options

Agreement. It is further the case of the Petitioner that it has a charge over all right, title, interest, benefits, claims and demands whatsoever of RDLDP in the Project and the Project Agreements. It is submitted that the aforesaid submission of the Petitioner is hopelessly and completely untenable on account of the fact that a reading of the definition of Project Agreement stipulates all agreements, etc. entered into in relation to the 'Project'. 'Project' has been defined under Schedule 1 of DTD 1 @Pg.234, Petition to mean the same meaning as provided under Recital-A. A perusal of Recital A of DTD 1 makes a reference to the Borivali Project @Pg.148, Petition whereas the Project mentioned under the Options Agreement pertains to the Wadhwali Project @Pg.488, Petition. Therefore, the Project referred to in the Options Agreement is not the same project as referred to in the DTD 1. The project contemplated under the Options Agreement is distinct and separate than the one contemplated under DTD 1. Thus, the reliance of the Petitioner on Clause 12 of DTD 1 and Schedules I & III fail completely and have been made with the sole intent to mislead this Tribunal.

The Petitioner has tried to rely on the use of the words '*or otherwise*' appearing in the definition of the term 'Project Agreements'. However, this is not a tenable argument as adopting this interpretation

would lead to the fallacious conclusion that the Petitioner has a claim over any and every agreement/contract entered into by RDLDP or its group concerns, whether or not concerning the Project. Not only is this interpretation far-fetched, but would also be contrary to the well-settled doctrine of *Ejusdem Generis*, i.e., '*the meaning of general words which follow the specified words are restricted to the same class of the specified words*'. Without prejudice to what is mentioned herein, the same in any event cannot bind the Corporate Debtor who is not party to DTD 1.

The aforesaid also garners support from the fact that the DTD itself sets out the 'Project Agreements' in Schedule VIII- which deal with agreements related to the Borivali Project. This is a very specific list and does not seem to intend to cover any and every agreement executed by RDLDP or its group companies.

In any even without prejudice to any of the submissions made hereinabove, Clause 12.7 @Pg.501, Petition unequivocally states that RDLDP cannot assign its rights, entitlements and / or obligations under the Options Agreement until repayment of the Yes Bank Loan. Therefore, until the entire loan is repaid to Yes Bank, RDLDP

cannot by its express covenants assign its rights under the Options Agreement to any person including the Petitioner herein. This loan has not been repaid. Further, no charge can be created on any the receivables of the Wadhwali Project, unless the same has been created by the Respondent, which has not happened in the present case. RDLDP cannot create any charge on the Wadhwali Project or its receivables. RDLDP cannot incur any liability on behalf of the Respondent.

- iii.* Without prejudice to the above, it is submitted that it is trite law as stated by the Supreme Court in the case of *M.C. Chacko v. State Bank of Travancore, Trivandrum, (1969) 2 SCC 343* that a party which is not privy to a contract cannot seek enforcement of the covenants of the same. The relevant extract of the judgment is reproduced as under:

“9...The Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant... Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows

*nothing of a right gained by a third party arising out
of a contract...”*

From the above, it is clear that since the Petitioner was never a party to the Options Agreement, the Petitioner (a 3rd party) can never substitute itself in place of RDLDP to seek refund of the Option Deposit made in pursuance of the Options Agreement. A copy of the judgment in *M.C. Chacko's case* is hereto annexed and marked as **Annexure-B**. Even otherwise and without prejudice, the Options Agreement is not a financing document.

D. The captioned Petition is barred under Section 10A of the IBC:

- a. The only document of which the Corporate Debtor herein is a part of is the Options Agreement. As stated above, the Petitioner is not a party to this document. As per the Petitioner @Pg.42, *Petition*, the date of default under the Options Agreement is 29th September 2020. Without prejudice to the Respondent's submissions hereinabove, it is submitted that the said purported debt is clearly barred under Section 10A of the IBC which reads as under:

“10A. Suspension of initiation of corporate insolvency resolution process.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months

or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.”.

- b. It is the Petitioner’s own case that the alleged date of default arose after 25th March 2020. Therefore, the captioned Petition is defective since no petition under Sections 7, 9 or 10 of the IBC can be filed for a default falling after 25th March 2020 up to September 2020.

E. Suppression of Material Documents by the Petitioner:

- a. The Petitioner has approached this Tribunal with unclean hands and is guilty of *suppressio veri* and *suggestion falsi*. It is submitted that the Petitioner has intentionally suppressed material/key facts and documents as the Petitioner is well aware that captioned Petition is not maintainable in light of the suppressed documents. The Petitioner has suppressed the following key documents:
- i. Debenture Trust Deed 7th December 2017;
 - ii. Debenture Trust Deed dated 5th January 2018
- b. It is submitted that the entire case of the Petitioner is based on the default of the Consent Terms. However, a perusal of the actual Consent Terms reveals that there are various financing documents as mentioned hereinabove which were executed between the Petitioner, Debenture Holders

and RDLDP (not the Respondent) subsequent to DTD 1.

Since the entire claims of the Petitioner arises out of apparently not just DTD 1 but Debenture Trust Deeds dated 7th December 2018 and 5th January 2018 as well, it is surprising as to why these documents have been suppressed by the Petitioner. Without annexing the same, how can one determine the contents or covenants contained in the same.

- c. The Hon'ble Supreme Court in *S.P. Chengalvaraya Naidu (Dead) by L.Rs. v. Jagannath (Dead) by L.Rs. &Ors.*, (1994) 1 SCC 1, held as follows:

“8...A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage...Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party...”

A copy of the Supreme Court's judgment in *S.P. Chengalvaraya's Case* is hereto annexed as **Annexure-C**.

- d. In light of the above said intentional and deliberate suppression of material documents by the Petitioner, the captioned Petition be dismissed with exemplary costs.

F. Disputed and Triable Issues

- a. The Corporate Debtor has set out that full claim of the Financial Creditor under the Financing documents has been settled under the Consent Terms dated 29.1.2021.
- b. The Financial Creditor has disputed this position and has sought to refer to documents including option agreement which is prior to the settlement of dispute under Consent Terms.
- c. The contentions and disputes between the financial creditor and the Corporate Debtor are triable issues pertaining to existence of a debt, default in payment of debt and liability of the Corporate Debtor beyond the clauses of the Consent Terms.
44. In the aforesaid circumstances the contention of the Petition are disputed. The Financial Creditor is seeking to raise contentions, allegations, demands which are disputed and which are contrary to the Consent Terms.
45. The objections regarding maintainability of the petition raised by the Corporate Debtor are bonafide, real, meritorious and are not hypothetical, illusionary or misconceived.
46. In the aforesaid circumstances the Financial Creditor is not entitled to initiate Application for Corporate Insolvency

Resolution process under IBC and the present petition is liable to be dismissed.

Findings:

47. We have heard the arguments of Financial Creditor and the Corporate Debtor and perused the records.

48. At the outset it is observed that the date of default for the Options Agreement stated in Part -IV of the Petition is 29.09.2020. The debt is barred under Section 10A of the Code which reads as under:

“10A. Suspension of initiation of corporate insolvency resolution process.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period. Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

49. It is pertinent to note that the suspension of initiation of CIRP was extended for a period of three months from 25.09.2020 vide notification bearing no. CG-DL-E-24092020-221936 dated 24.09.2020. Thereafter, the suspension was further extended vide notification dated 22.12.2020 from 25.12.2020. In view of above

circumstances, the claim of the Petitioner towards the Options Agreement is rejected.

50. We have perused the Judgments relied upon by the Petitioner of the Hon'ble Supreme Court (in para 40 supra) on the issue that a non-signatory party can be bound to an arbitration agreement where its group companies were parties. The Apex Court relying on decision of a three-judge bench in *Chloro Controls India (P) Ltd. V. Severn Trent Water Purification Inc. (2013) 1 SCC 641* has held that non-signatory or third parties could be subjected to arbitration without their prior consent but this could be done in exceptional cases if there is direct relationship between parties, commonality of subject and the entire transaction being of composite nature. The transaction has to be such where performance of mother agreement cannot be done without performance of the other ancillary agreement. If the above questions are answered in the affirmative then the non-signatories could be bound to the arbitration agreement. Further, there has to be common intention of the parties, where circumstances indicate that both signatories and non-signatories were intended to be bound.
51. In the present case the Options Agreement and DTD 1 and the DTD Amendment Agreement dated 20.10.2018 are executed for different projects. The project to be developed under the Options Agreement (Recital B at Page 488 of the Petition) is situated at Kurla Taluka being the Wadhwali Project. The project sought to be developed under DTD stated in Recital A (at Page 148 of the Petition) is the Borivali Project. Therefore, the analogy of the Petitioner that it has charge over the other assets as stated in

Debenture Trust Deed cannot be considered as the projects are distinct.

52. Further, on perusing the financial documents relied by the Petitioner, it is observed that the Financial Creditor's right to sue emanates from the DTD pursuant to the default committed by RDLDPDPL under the said Debenture Trust Deed, to which the Corporate Debtor is not a party. Moreover, it is the Petitioner's analogy that under the Options Agreement default was committed by the Corporate Debtor in repayment to RDLDPDPL. Therefore, Petitioner's contention that it can step into the shoes of RDLDPDPL for recovering the amounts due from the Corporate Debtor. The above stated analogy of the Petitioner is flawed for the reason that the document i.e. DTD on which the Petitioner has based its claim is executed with RDLDPDPL which is a separate company having different CIN number than the Corporate Debtor. Therefore, the Corporate Debtor herein cannot be imputed for breach committed by RDLDPDPL.
53. In support of the above contention, the Corporate Debtor has relied on the Judgment of the Hon'ble NCLAT in Anil Syal v. Sanjeev Kapoor (Proprietor Kapoor Logistics) (Company Appeal (AT) (Ins.) No. 961 of 2019 wherein it was held as under:

“Admittedly invoices have been issued in the name of ‘M/s Flywheel Logistics Pvt. Ltd.’ It is also on record that ‘M/s Flywheel Logistics Pvt. Ltd.’ and ‘M/s Flywheel Logistics Solutions Pvt. Ltd’ are different ‘Corporate Entities’, having deferent CIN Numbers and registered addresses. Thus, it is clear that the Respondent No 1 Applicant / ‘Operational Creditor’ has no right to claim dues, relating to the invoices issued against ‘M/s Flywheel Logistics Pvt.

Ltd.’, from the corporate debtor M/s ‘Flywheel Logistics Solutions Pvt. Ltd.’ i.e. FLSPL, the Respondent No 2, which is a separate corporate entity, having different CIN Number.”

54. In applying the test laid down by the three Judges of Hon’ble Apex court in the matter of ***Chloro Controls India (P) Ltd. V. Severn Trent Water Purification Inc. (2013) 1 SCC 641*** and the rationale laid down by the Hon’ble NCLAT is that for dues payable by a separate corporate entity, its sister concern/group company cannot be driven into CIRP. Hence, the present Petition is liable to be rejected.
55. We have also considered the facts of the case in the light of the Order passed by Hon’ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors.* [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a ‘dispute’ as far as Section 7 petition is concerned. As soon as a ‘debt’ and ‘default’ is proved, the adjudicating authority is bound to admit the petition.
56. It is noted that the objections regarding maintainability of the petition raised by the Corporate Debtor are bonafide, real, meritorious and are not hypothetical, illusionary or misconceived.
57. It is also noted that in the aforesaid circumstances the Financial Creditor is not entitled to initiate Application for Corporate Insolvency Resolution process under IBC and the present petition is thus liable to be dismissed.
58. It is, accordingly, hereby ordered as follows: -

- (a) The petition bearing **CP (IB) 239/MB/C-I/2019** filed by **IDBI Trusteeship Services Limited**, the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Radius and Deserve Builders LLP [LLP No: AAA – 5895]**, the Corporate Debtor, is rejected.

Sd/-
SHYAM BABU GAUTAM
Member (Technical)
23.09.2022
SAM

Sd/-
JUSTICE P. N. DESHMUKH
Member (Judicial)