Vipul Limited
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E-mail : info@vipulgroup.in
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Ref. No. VIPUL/SEC /FY2021-22/ **July 12, 2021**

The Secretary BSE Limited, (Equity Scrip Code: 511726) Corporate Relationship Department, At: 1ST Floor, New Trading Ring, Rotunda Building, Phiroze Jeejeebhoy Towers, Dalal Street, Fort,Mumbai-400001	The Manager (Listing) National Stock Exchange of India Limited, (Equity Scrip Code: VIPULLTD) Exchange Plaza, Bandra Kurla Complex, Bandra, Mumbai-400051

Sub: Disclosure under Regulation 30 read with Schedule III of SEBI (LODR) Regulations, 2015

Dear Sir(s),

This is to place on record that M/s Vipul Greens Residents Welfare Association claiming to be a Financial Creditor, had filed a petition under Section 7 of IBC before NCLT, New Delhi Bench. The said petition has been admitted today i.e. 12.07.2021, copy of the orders are attached herewith.

By the same order, the Hon''ble NCLT has appointed Mr. Ravi Sethia, Insolvency Professional (IBBI Registration No. IBBI/IPA-001/IP-P01305/2018-19/12052) as the Interim Resolution Professional ("IRP") of the company.

This is for your information

Thanking You,

Yours Faithfully,
For **Vipul Limited**

Sd/-
(Sunil Kumar)
Company Secretary
A-38859

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB)-541(ND)/2019

IN THE MATTER OF:

M/S VIPUL GREENS RESIDENTS WELFARE ASSOCIATION
REGISTERED OFFICE- VIPUL GREENS,
SOHNA ROAD, SECTOR 48,
GURGAON, HARYANA- 122001 **...FINANCIAL CREDITOR**

VERSUS

VIPUL LIMITED
REGISTERED OFFICE -UNIT NO 201,
C-50, MALVIYA NAGAR,
NEW DELHI 110017

ALSO AT:
VIPUL TECHSQUARE,
GOLF COURSE ROAD, SECTOR-43,
GURGAON 122009, HARYANA...CORPORATE DEBTOR

SECTION: U/S7 of IBC, 2016

Order delivered on : 12.07.2021

CORAM:
MR. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (JUDICIAL)
MR. L. N. GUPTA, HON'BLE MEMBER (TECHNICAL)

PRESENT: -

Adv. Rajiv K. Virmani, Adv. Karan Valecha and Adv. Anuj Malhotra for the Applicant, Adv. Sumesh Dhawan for Respondent

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

The present petition is filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on the grounds of its inability to liquidate its financial debt.

2. The facts mentioned in the application in brief are as follows:

i. That the Vipul Greens Residents Welfare Association ("VGRWA") is a Residents Welfare Association, acting for and behalf of residents of Vipul Greens Complex, since October, 2008.

ii. That the present issue arises out of an arrangement between the Applicant and the Corporate Debtor by way of which the Corporate Debtor owes an amount of Rs. 6,51,36,981/- on account of Maintenance Security Deposits and accrued interest thereon.

iii. That the Apartment Owners entered into Flat Buyer's Agreements with Corporate Debtor from 2004 onwards for purchase of flats in a multi-stored group housing complex in the name and style of Vipul Greens situated at Sohna Road, Sector-48, Gurgaon, Haryana. There are total 644 number of flats in the Vipul Greens Complex, out of which many apartment owners are members of VGRWA.

iv. That Clause 4(b) of the Flat Buyer's Agreement enabled Corporate Debtor to collect maintenance security deposit @ Rs. 50/- per sq.ft. of the super area of each flat. Pursuant to the said clause, Corporate Debtor has collected an amount of Rs. 6,51,36,981/- from the Apartment Owners under the head of Maintenance Security Deposit.

v. That various Deeds of Declaration were executed by the Land Owner under the Haryana Apartment Ownership Act, 1983. The details of the Deed of Declarations are enumerated here in below:

S.no	Date of Deed	Blocks	No. of Flats	Occupation Certificate Memo No.and Date
1.	30.10.2007	6-12	196	17202 dt.04.07.2007
2.	21.04.2008	14-20	224	5285 dt. 04.03.2008
3.	05.08.2010	3,5 & 22	84	7937dt.22.06.2010
4.	04.03.2011	1,2,4 &21	112	474 dt. 14.01.2011
5.	28.03.2013	127 EWS units,14 shops & 01 community centre	-	ZP-30Vol-II/JD(BS)/2012/27195 dated 29.12.2011.
6.	02.08.2013	23	28	ZP-30Vol-I/JD(BS)/2013/39595 dated15.05.2013.

vi. That between 2007 to 2016, many of whom are members of VGRWA entered into a Maintenance Services Agreement with Corporate Debtor and Vipul Facility Management Private Limited ("Facility Manager"). As per Recital G of the abovementioned Agreement, the Corporate Debtor acknowledged the formation of VGRWA in compliance with the provisions of Haryana Apartment Ownership Act, 1983. In terms of provisions of Haryana Apartment Ownership Act, 1983 and the Maintenance Services Agreement, VGRWA upon handover is responsible for the maintenance of Vipul Greens Complex and operation of various common services, facilities and equipment in the common area of the Complex of Vipul Greens Complex. Clause 2(D) of Maintenance Services Agreement also provides that the Corporate Debtor is obligated to transfer the said corpus of maintenance Security Deposit together with interest thereon to VGRWA at the time of handing over of maintenance to them.

vii. That on 21.02.2013, taking stern note of the malpractices at the end of various colonizers and developers to delay the handing over of complex, after execution of Deeds of Declaration, Office of Senior Town Planner, Gurgaon, on behalf of DTCP Haryana had issued a directive to various colonizers and developers including Corporate Debtor at Serial no. 11 of Memo No. STP(G) /2013/421-2456 dated

21.02.2013, thereby directing the colonizers to handover that part of condominium to VGRWA for which occupation certification/occupation certificate has been granted.

viii. That between 2013 to 2018, VGRWA remained engaged with corporate Debtor for transfer and handover of maintenance and operation services. Finally, on 27.03.2018, Corporate Debtor wrote to several agencies communicating their decision to hand over maintenance and operation services to VGRWA with effect from 01.04.2018.

ix. That on 28.03.2018, a letter was sent by Mr. Amit Jindal (the then President of VGRWA) putting on record certain understanding agreed between VGRWA and Corporate Debtor. The points discussed were as follows:

(a) Corporate Debtor should not raise any bill after 31.03.2018 to the residents of Vipul Green;

(b) Corporate Debtor shall collect the payments for the bills raised by it and similarly VGRWA shall collect the payments for the bills raised by it.

It is, however, pertinent to note that the electricity bill of March 2018 had to be finally paid by VGRWA in order to avoid disconnection of electricity connection.

x. That, vide letter dated 31.03.2018, Corporate Debtor puts up arbitrary, irrational and illegal demands as precondition for handing over of Vipul Greens Complex to VGRWA despite the directive of Office DTCP dated 21.02.2013 wherein it was clearly directed that handover of condominiums should not be delayed by the colonizers. Some of the demands are as follows:

   a. Execution of Handing Over and Taking Over Agreement("HOTO"), a condition put up by Corporate Debtor to circumvent the directives of DTCP and solely for the purpose of delaying the hand over and thus the corpus of maintenance security deposit.

   b. The said letter further threatened VGRWA and its officers to execute HOTO as according to them it is the only legally

and amicably possible knowing fully well that hand over could not have been delayed putting arbitrary conditions like above.

c. Corporate Debtor threatened VGRWA to stop the services provided by the vendors.

xi. That VGRWA vide letter dated 01.04.2018 expressed its anguish and surprise over the letter dated 31.03.2018 issued by Corporate Debtor over a sudden change of stance. VGRWA further went on record to state that while on 27.03.2018, Corporate Debtor had written to various agencies providing services to the society, they are estopped from resiling from previous stand. Corporate Debtor had earlier written to Vendors the following:

> *"We have decided to hand over the operation and maintenance of Vipul Greens Complex to VGRWA w.e.f. 1.04.2018. Therefore, all the correspondence for the site issues and payment etc. shall be made by Vipul Greens RWA. You need to raise your invoices to VGRWA only from April 2018 onwards".*

VGRWA further urged the Corporate Debtor not to stop services to the Complex. The said request was in response to threat given by Corporate Debtor to VGRWA.

xii. That an email dated 10.04.2018 was sent by Corporate Debtor admitting the maintenance security deposit. The said e-mail was sent by Mr. Mohd. Arshad (an employee of Corporate Debtor) to Mr. Neetu Ram (Manager of Accounts staff of Nimbus Harbour, the service provider).

In addition to the admission of receipt of Maintenance Security Deposit in the abovementioned e-mail by Corporate Debtor, certain

interest payable on Maintenance Security Deposit, was also calculated by them and sent by e-mail.

xiii. That an email dated 17.07.2018 was sent by VGRWA to Corporate Debtor submitting that they were handed over maintenance of Vipul Greens Complex w.e.f. 01.04.2018 without any working capital and that having completed 3 months of maintenance they are finding it difficult to meet contractual obligations of host of vendors and agencies. VGRWA further requested Corporate Debtor to provide some operational funds in the interim while other formalities are being complied with.

xiv. That despite of reminder e-mails dated 26.07.2018 and 16.08.2018 by VGRWA to the Corporate Debtor calling upon them to transfer some amount of operational funds in the interim while other processes were going on, no response was received from them.

xv. Further, several correspondences were made and email sent to release of maintenance security deposit of Rs. 6,51,36,981/- along with interest thereon and further pressed the need to release at least 25% of the deposits immediately for the smooth running of operation of the condominium. Corporate Debtor was requested to do the needful with 10 days of receipt of letter.

xvi. That on 16.11.2018, Corporate Debtor responded to the letter dated 08.10.2018 whereby it was agreed to release certain amounts of maintenance security deposit, if the said amount is reasonable. But no amount is released by them.

xvii. That a meeting was held on 22.11.2018 between office bearers of VGRWA and senior employees of Corporate Debtor wherein CEO of Corporate Debtor expressed that they are in financial stress and hence not in the position to commit any payment schedule.

It is also a matter of record and accordingly mentioned in minutes of the aforesaid meeting that some of the flat owners, even after the handover on 01.04.2018, erroneously continued to pay to Corporate Debtor the Common Area Maintenance charges and

electricity bills. An amount of Rs. 25,31,045/- was paid by some Residents to the Corporate Debtor until November, 2018 and the same is still lying with them till date in spite of the assurance by the Corporate Debtor. The same was intimated to the Corporate Debtor vide Letters dated 25.10.2018 and 30.11.2018.

xviii. That Corporate Debtor sent a letter dated 27.11.2018 in pursuance if the Minutes of Meeting held between representatives of VGRWA and the Corporate Debtor giving its 'No Objection' to VGRWA for undertaking facade work at Vipul Greens Complex. This signified the awareness and consent of Corporate Debtor in the fact that VGRWA is maintaining the Vipul Greens Complex.

xix. That another letter dated 06.12.2018 was received from Corporate Debtor admitting the fact that Corporate Debtor was handling maintenance and operations of Vipul Greens Complex till 31.03.2018thereafter the responsibility of the same has been handed over to VGRWA w.e. f. 01.04.2018.

xx. That VGRWA sent a demand notice to the Corporate Debtor demanding /giving it final opportunity to repay Maintenance Security Deposit amount with interest.

xxi. That in response to the Demand notice dated 15.01.2019, the Corporate Debtor vide letter dated 22.01.2019 has objected to the return of maintenance Security Deposit on various flimsy grounds which are without any basis and contrary to the records.

xxii. That the said default first occurred on 01.04.2018 is continuous in nature and is within Limitation.

3. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:

i. That the subject Company Petition is an abuse of the process of law and the same has been filed only on experimental basis. There is no default on part of the Respondent Company in terms of Section3(12) of the Code, 2016. Further, there is no debt due and payable within the meaning of Section 3(11) of the Code, 2016 and

the amount purportedly to be claimed in default by the petitioner is not refundable by the Respondent. The subject petition is filed only with the ulterior motive with an arm-twisting tactic to put pressure upon the Respondent to extort money from the Respondent Company without any cause of action.

ii. The instant Company Petition has been filed by the Petitioner claiming itself to be the Financial Creditor in terms of the provisions of the Code. Be that as it may, it is pertinent to note that there exists no financial debt between the Petitioner and Respondent as the claimed amount was neither borrowed by the Respondent Company nor disbursed as a loan to the Respondent Company.

iii. That, the term default has been defined under Section 3(12) of the Code and for the purpose of ascertainment of default, it is imperative to demonstrate the date and time when the alleged debt has become due and payable. In the present matter no debt is due and payable to the Petitioners by the Respondent Company.

iv. It is an admitted case of the Petitioner that neither any agreement has been entered into between the Petitioner and the respondent Company nor any amount has been paid/ transferred by the Petitioner to the Respondent Company.

v. That the amount as being claimed by the Petitioner is not a financial debt within the purview of Section 5(8) of the Code as neither the amount attracts interest nor the same has been disbursed against the consideration for the time value of money.

vi. That the Respondent Company has developed a multi-storied group housing complex in the name and style of "Vipul Greens" and there are as many as 644 flats in the instant housing complex.

vii. That, the Petitioner is a self-proclaimed residents Welfare association of Vipul Greens claiming itself to be acting for and on behalf of the 'residents of Vipul Greens'. It is pertinent to note that the Petitioner has only approximately 300 flats as its members out of the total 644 flats of Vipul Greens.

viii. That, the allottee(s) flat owner(s) had entered into Flat Buyer's Agreement with the Respondent Company at the time of allotment of their respective flat in Vipul Greens. The relevant clauses of the Flat Buyer's Agreement germane to the instant matter are entailed hereunder:

a. As per Clause 4(b) of the Agreement the allottee(s)/ flat-owner(s) have deposited Maintenance Security at the rate of INR 50/- per sq. ft. of the super area of the flat with the Respondent Company, and the said corpus amount was to be handed over to the society as and when formed after settlement of accounts.

b. As per clause 8 of the Agreement the allottee(s)/ flat owner(s) are under mandate to pay the relevant property tax and other taxes levied or leviable in future on the group housing complex i.e., Vipul Greens.

c. As per clause 8(b) of the Agreement the allottee(s)/ flat owner(s) further undertook to abide by all laws from time to time.

ix. That the Respondent Company has nominated/ appointed M/s Vipul Facility Management Pvt. Ltd. for the purposes of maintenance of Vipul Greens.

x. That, the allottee(s)/ flat owner(s) pursuant to the signing of flat Buyer's Agreement with the Respondent Company, has also entered into Maintenance Services Agreement with the respondent Company and one M/s Vipul Facility Management Pvt. Ltd. The relevant clauses of the Maintenance Services Agreement germane to the instant matter are entailed hereunder:

i) Clause 4 of the Maintenance Services Agreement details out the procedure of billing and payment of maintenance charges by the allottee(s)/ flat owner(s). Further, clause4(V) details out the interest charges payable by the allottee(s)/ flat owner(s) for the period

of delay. The relevant clause 4(V) is entailed hereunder for ready reference:

"V. VFM shall charge interest @ 15% per annum for the period of delay in payment after the due date on monthly basis for first three months of default and in case the default continues then besides the penal interest additional penalty of Rs. 0.30/- per square feet per day shall be levied till the balance outstanding is paid."

xi. At this juncture, it is pertinent to note that pursuant to incorporation of the Petitioner as the residents welfare association of Vipul Greens and in compliance to the rules and regulations of the Department of town & Country Planning, Haryana, the Petitioner and respondent Company started the negotiations for transfer of administration and operations of the Vipul Greens.

xii. That the Respondent Company proposed to enter into one Handing Over and Taking Over Agreement ("HOTO") with the Petitioner so as to protect the interest of the flat owners of Vipul Greens. The aforesaid HOTO agreement is still pending and has not been executed by the Petitioner till date on one pretext or the other.

xiii. That, as the HOTO agreement was pending at the end of the Petitioner and as the Petitioner was putting pressure upon the Respondent Company to transfer the administration,

xiv. Therefore, it was decided that from 01.04.2018 the administration of the Vipul Greens shall be taken over by the petitioner. It was further agreed that the Respondent Company shall continue to be engaged with the affairs of the Vipul Greens till the time HOTO agreement is executed between the parties. It is precisely for this reason that the respondent Company has written to various agencies involved with the Vipul Greens that from 01.04.2018 administration shall be looked after by the Petitioner and all the communications/ correspondence for the site issues and payment etc. shall be made to the Petitioner from April, 2018 onwards.

xv. That, pending the execution of HOTO Agreement, and considering the pressure being put by the Petitioner upon the respondent Company for the transfer of administration of the Vipul Greens, the Respondent Company proposed the petitioner to execute Deed of Indemnity pending the finalization and execution of HOTO Agreement, which has been denied and delayed by the Petitioner on one pretext and the other.

xvi. That, the Petitioner started demanding the Respondent Company to release the security deposit amount as collected by the Respondent Company from the flat owners of Vipul Greens under the Flat Buyer's Agreement and Maintenance Service Agreement. That, the said security deposit could not have been transferred to the Petitioner till the time the HOTO Agreement is executed and till the time the accounts are settled/ reconciled.

xvii. That as per the records and books of accounts of the Respondent Company many flat owners of Vipul Greens has defaulted in payment of the maintenance bills and are liable to pay penalty in terms of Clause 4(V)of the Maintenance Service Agreement. That, a total amount of INR 8,05,56,962/- is outstanding to be paid by various flat owners towards the maintenance bills under Clause 4(V) of the Maintenance Service Agreement.

xviii. That Haryana Government has levied/ revised the Haryana Value Added Tax on construction and sale of units by a developer/constructor to buyers under the Haryana Value Added Tax Act, 2003. That, the said law has attained finality and has been held to be valid in view of the judgment of Hon'ble Supreme Court in the case of *M/s Larsen & Toubro Ltd. vs. State of Karnataka & Anr. [(2014) 1 SCC 708].*

xix. That, in view of the above the Haryana Government vide its Notification No. 19/ST-1/H.A.6/2003/S.59A/2016 dated 12.9.2016 issued by the Excise and Taxation Department, has introduced an amnesty scheme namely the Haryana Alternative Compliance Scheme for Contractors, 2016 for the recovery/ payment of tax, interest, and penalty or other dues payable under

the Haryana Value Added Tax Act, 2003for the period upto 31.03.2014.

xx. In view of the said amnesty scheme the government has provided an option to pay a lumpsum amount at the rate of 1.05% for the period upto31.03.2014 towards the Haryana Value Added Tax Act,2003.

xxi. That, the Respondent Company in view of the notification of the government has written letters and/or e-mails and thereafter reminder letters to the flat owners of Vipul Greens to pay the respective amount payable towards Value Added -Tax as demanded by the government authorities.

xxii. That, total amount of INR 50,72,651/- is outstanding and due and payable by the flat owners of Vipul Greens to the Respondent Company towards the Haryana Value Added Tax.

xxiii. That, in terms of Clause 8 read with Clause 8(b) of the Flat Buyer's Agreement the flat owners are under mandate to pay the outstanding amount towards the Haryana Value Added Tax, which has not been paid and is lying outstanding.

xxiv. That the aforesaid outstanding amount due and payable to the Respondent Company is to be adjusted against the Maintenance Security deposit as per the clause agreement executed between the flat owners and the Respondent Company.

xxv. That in terms of Clause 4(b)of the Flat Buyer's Agreement the accounts are to be settled before the handing over/ transfer of the corpus amount of maintenance security deposit to the society, which in the present case is Petitioner as per their claim. That, till the time the accounts are not settled/ reconciled no amount is liable to be transferred from the Maintenance Security Deposit of the flat owners of Vipul Greens.

4. The Petitioner/Financial Creditor has filed its rejoinder and has asserted the following contentions:

i. That the Petitioner is a Financial Creditor within the meaning of Section 5(7) of the Code and the amount claimed by the Petitioner and duly admitted by the Respondent Company, is a Financial Debt within the meaning of Section 5(8) of the Code. The amount allegedly claimed by the Respondent Company is neither liable to be adjusted nor settled from the "Maintenance Security Deposit". Execution of Handing Over and Taking Over Agreement has no legal sanctity/backing.

ii. That the Respondent Company is very much in default in terms of sections 3(11) and 3(12) of the Code and became due and payable to Petitioner on 01.04.2018 when the maintenance services of the condominium named "Vipul Greens" was admittedly handed over to the Petitioner.

iii. That the Petitioner Association is acting as representative in interest of all 644 flat buyers for claiming the amount of "Maintenance Security Deposit" along with accrued interest which is illegally being withheld by the Respondent Company which is consideration against time value of money.

iv. That the Petitioner is a legally registered and duly recognized Welfare Association of the flat owners of "Vipul Greens" condominium. The Petitioner has approximately 400 flat owner of "Vipul Greens" condominium on its roll of members and not 300 as wrongly claimed by Respondent Company. It is further stated that as per Respondent Company itself, it has been dealing with Petitioner in its capacity of bona fide representative of flat owners of "Vipul Greens" condominium.

v. That it is nowhere contemplated in any law making it just or necessary that transfer of administration and operation of "Vipul Greens" condominium can only be done by executing any agreement whatsoever. It is further stated that the so called notion of signing of HOTO agreement was brainchild of the Respondent Company which was actually in furtherance of its nefarious designs of delaying the handover and thereby keep on enjoying the benefits of "Maintenance Security Deposit" for as long as possible.

It is further stated that the alleged HOTO agreement was deliberately drafted by the Respondent Company in such a manner which is not only prejudicial to the interests of the flat owners but also seeks restructuring of the repayment of "Maintenance Security Deposit" to Petitioner.

vi. That the Petitioner is/was never in a position of putting any sort of pressure upon Respondent Company but was actually time and again requesting the respondent Company to hand over the administration of "Vipul Greens" condominium along with Maintenance Security Deposit which rightfully belongs to Petitioner. The signing of Deed of Indemnity was another ploy on part of the Respondent Company to delay the process of handover since the Petitioner was constantly persisting with its legal demand.

vii. It is further stated that the alleged amount of Rs. 8,05,56,962/- is exorbitantly high pitched penalty calculated at the rate of about 750% per month on the pending maintenance charges, if any.

viii. That the alleged demand letters and reminders are nothing but again forged and fabricated documents created only with a view to defeat the rightful claim of Petitioner. Although the para under reply talks about various e-mails being sent to flat owners of "Vipul Greens" Condominium but not even a single one has been annexed herewith.

ix. That neither any amount is due nor payable by any of the flat owners whatsoever and even if it is assumed, though not admitted that the same is due and payable, it is only the maintenance dues that are to be adjusted against the "Maintenance Security Deposit" and nothing else whatsoever. It is further stated that alleged reliance upon the relevant clause of the agreement by the Respondent Company is not only erroneous but also highly misplaced and self-serving.

x. That settling/reconciliation of accounts were to be done for genuine claims/dues of the Respondent Company and not of any false, fabricated and concocted figure.

5. That the Respondent/Corporate Debtor has further filed a supplementary affidavit dt. 20.08.2019, which is nothing but repetition of the reply except the following:

i. That the Petitioner has not even disclosed its locus before this Tribunal as the Petitioner has miserably failed to even disclose the list of members of flat owners who are the members of Petitioner Society. The said detail is imperative in the present matter as it is the admitted fact even by the Petitioner that the Petitioner does not represent all the flat owners of Vipul Greens Complex. However, the Petitioner is claiming the Maintenance Security Deposit amount of all the flat owners of Vipul Greens Complex.

ii. That as per the books of accounts of the Respondent Company the total outstanding maintenance amount due and payable as on 30.06.2019 is INR 15,43,86,151/- which is inclusive of the interest and penalty amount as per clause 4(V) of the Maintenance Service Agreement.

iii. That other than the outstanding maintenance amount, an amount of INR 50,72,651/- is also outstanding and due and payable by the flat owners of Vipul Greens to the Respondent Company towards the Haryana Value Added Tax, as detailed in the Reply to Company Petition filed by the Respondent Company.

iv. That it is a settled proposition of law that in a Petition under Section 7 the Code it is to be seen that the debt is due i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. And in the matter at hand the debt has not yet become due as the same can only become due after the settlement of accounts i.e., in future after the reconciliation.

v. That in terms of Section 7(5) of the Code no default appears to have occured if there are pending obligations on the part of the Financial Creditor itself, and the default is to arise only after fulfilling the obligations on part of the Financial Creditor and only then the amount is said to become due and payable. And in the matter at

hand the Petitioner has failed to fulfil its obligations and therefore, the instant Petition filed Under Section 7 of the Code is liable to be rejected.

6. The Petitioner/Financial Creditor has further filed a counter affidavit dt. 13.09.2019, which is nothing but repetition of the facts mentioned in petition and rejoinder except the following:

i. That the contents of Supplementary Affidavit dated 20.08.2019 are patently false, frivolous and contrary to not only the records, but also to Respondent Company and its Authorized Representative's own knowledge and Petitioner Association hereby reserves its right to initiate appropriate legal proceedings against the Respondent Company and its Authorized Representative Sh. Rakesh Sharma for their said misadventure.

ii. That it is denied that Petitioner Association ever took over the possession of the Maintenance Services of "Vipul Greens Condominium" forcibly from Respondent Company.

iii. That all the contentions raised by the Respondent Company in their Supplementary Affidavit dated 20.08.2019 as well as the documents and calculations annexed therewith, being completely false, frivolous, baseless and mala fide, are denied in toto. The amount of Rs. 15,43,86,151/- arrived at by the respondent Company towards maintenance services due as also the amount of Rs. 50,72,651/- allegedly towards Haryana Value Added Tax is vehemently denied being false, frivolous baseless and mala fide.

iv. That all the contentions raised by the Respondent Company in its Supplementary Affidavit dated 20.08.2019 are nothing but repetition of the previous contentions raised by them in their reply and have been duly answered/responded to by the Petitioner Association in its Rejoinder.

7. The Petitioner/Financial Creditor has filed its written submissions and submitted the following:

i. That the Corporate Debtor in terms of clause 4(b) of the Flat Buyer Agreement ('FBA') executed, at the time of booking of apartment collected sums under the head of maintenance security deposit to the tune of Rs.6,51,36,981/- from 644 apartment owners of the Complex ('Security Deposit'). Accordingly, in furtherance of the FBA, the Corporate Debtor executed a Maintenance Services Agreement ('MSA') with the apartment owners at the time of handover of possession which provided for maintenance services of the complex. As per clause 2(D) read with clause 2(F) of the MSA,the security Deposit so collected by the Corporate Debtor consist of two components — (i) Interest-free working capital loan equivalent to 25% of the Security Deposit to meet working capital requirement for maintenance of the Complex ("Working Capital Loan"); and (ii) Interest-bearing deposit equivalent to 75% of the Security Deposit, which can be used only for capital replacements and on which the corporate Debtor is liable to pay interest @ SBI rate for 3-years term deposit ('Interest-bearing Deposit').

ii. That by virtue of Clause 2(D) of the MSA, the Corporate Debtor is entitled to adjust the Working Capital Loan (i.e. 25% of the Security Deposit) against any default in payment of Maintenance bills by the apartment owners, however, no adjustment or set-off is allowed from the Interest-bearing Deposit (i.e. 75% of the Security Deposit), as wrongly alleged by the Corporate Debtor on the basis of the FBA. As per Clause 16 (Entire Agreement) of the MSA, the MSA revokes and supersedes all previous discussions/correspondences and agreements between the parties covering the matters covered in this agreement whether written, oral or implied which makes it imperative that clause 2(D) of the MSA supersedes clause 4(b) of FBA.

iii. It is further contended, out of the total Security Deposit, the Corporate Debtor is entitled to adjust the Working Capital Loan that too only against default in payment of maintenance bills by individual apartment owners on one-to-one basis. Section 5(8)(a)

of the Code, the present debt is a *'Financial Debt'* which means and include *'money borrowed against payment of interest'*, and *includes any amount raised under any transaction which has commercial effect of a borrowing.* Therefore, default has occurred at the behest of the Corporate Debtor as no payment has been made to the Petitioner against the balance Security Deposit of Rs.4,88,52,736/- being Interest-bearing Deposit along with accrued interest thereon as well as balance unadjusted amount of the Working Capital Loan.

iv. In addition to the above, the Petitioner submits that an amount if described as 'Deposit', cannot be excluded from the definition of 'Financial Debt' per se as consideration for payment of interest on the amounts collected under the head loans by the Corporate Debtor is nothing but the consideration for the time value of money, as it increases the value of investment/debt with time. In this regard the Petitioner places reliance on the recent order dated 29.01.2021 passed by the Hon'ble Appellate Adjudicating Authority in *Company Appeal (AT) (Insolvency) No. 502 of 2020 titled 'Satish Chand Gupta v. Servel India Private Limited'* wherein it was held –

> *'42. On a careful consideration of respective contentions and in view of the fact that the Respondent / Corporate Debtor had accepted certain amounts from the Appellant and credited the interest in a consistent manner against such amounts for a continuous period of five years, as pleaded by the Appellant and also that the 'Corporate Debtor' had accepted money from the Appellant against the payment of interest and bearing in mind the payment of interest on the amounts borrowed by the Respondent Company is nothing but a consideration for the time value of money and in as much as the 'interest' is the compensation paid by the borrower to the lender for using the lender's money over a period of time, this Tribunal*

comes to an inevitable and inescapable conclusion that the Appellant's status is that of a 'Financial Creditor' as per Section 5(7) read with Section 5(8) of the Code and that there is a default in payment of the accepted amounts by the Respondent/CD and in short, the respondent / Corporate Debtor comes within the purview of the definition of 'Financial Debt'. Viewed in that perspective, the contra view taken by the Adjudicating Authority in coming to the conclusion that the application filed by the Appellant / Financial Creditor is not maintainable for initiation of Section 7 of the Code is clearly unsustainable in the eye of law, as held by this Tribunal, to prevent an aberration of justice. Consequently, the Appeal succeeds.'

Therefore, in terms of Section 3(11) read with Section 5(8) of the Code, the Security Deposit amount, at least to the extent of Interest-bearing Deposit (including interest accrued thereon) and unadjusted Working Capital Loan, qualifies as "Financial Debt" against which default has been committed by the Corporate Debtor as it has failed to transfer the same to the Petitioner at the time of handover of maintenance of the complex.

v. It is further contended that the Petitioner RWA is duly competent in terms of the provisions of the Haryana Apartment Ownership Act, 1983 to act on behalf its members i.e. the apartment owners and furthermore, the Petitioner is the assignee of the Security Deposit as per Clause 2D and Clause 5 of the MSA and as such is financial Creditor to the Corporate Debtor in terms of Section 5(7) of the Code which includes a person to whom financial debt has been legally assigned or transferred. Thus, the nature of debt (as submitted above) owed to the Petitioner is a financial debt and as such the Petitioner herein is a financial creditor in terms of the Code.

vi. It is further contended, in terms of Section 3(12) of the Code, default means non-payment of debt whether whole or any part,

which occurred on part of the Corporate Debtor on 01.04.2018 when the condominium of the maintenance operations of the common services, facilities and equipment in the Complex was handed over to the Petitioner RWA and as such the said default is continuing and still subsisting.

vii. Without prejudice to the above, the Petitioner submits that documents placed on record state that in terms of Clause 2(D) of the MSA, the Corporate Debtor was liable to transfer the Security Deposit along with interest accrued thereon to the Petitioner on 01.04.2018 at the time of handover of maintenance of the Complex. However, the Corporate Debtor defaulted in payment of this amount even after receipt of repeated emails/letters in this regard from the Petitioner on 17.07.2018,26.07.2018, 16.08.2018 and 08.10.2018. Furthermore, the Corporate Debtor, in its letter dated 16.11.2018, agreed to release 'reasonable' amount of the Security Deposit but failed to pay any amount Finally, as per the minutes of the meeting held on 22.11.2018, CEO of the Corporate Debtor admitted that the Corporate Debtor is in financial stress and hence not in a position to commit any payment schedule.

viii. It is further contended, the decision of the Hon'ble National Company Law Appellate Tribunal, New Delhi in *Company Appeal (AT)(Insolvency) No.172 of 2019 titled Indiabulls Housing Finance Ltd. V. Rudra Buildwell Projects Private Ltd.* is not applicable to the present petition as the Corporate Debtor has failed to appreciate that the Petitioner RWA is the legal assignee of the debt in terms of the MSA and further draws its power to represent the apartment owners from the Haryana Apartment Ownership Act, 1983.

ix. It is further contended, the agreements between the Petitioner and the Corporate Debtor out rightly reflects the receipt of money by the Corporate Debtor while the admissions by the corporate Debtor placed on record by the Petitioner evidences the liability of the Corporate Debtor in payment of interest by the 'Corporate Debtor' to the Appellant. Moreover, the email communications of the Corporate Debtor dated 10.04.2018 written to the Petitioner

admitting and confirming the Security Deposit of Rs.6,51,36,981/- and interest payable thereon by the Respondent that are on record disclose the admissions and acknowledgement made by the 'Corporate Debtor' of its liability to repay the Petitioner's debt along with interest categorically constitute default at the behest of the Corporate Debtor. Thus, CIRP shall be initiated against the Corporate Debtor on account of such default.

x. It is further contended, the Petitioner that the total amount of claim at time of-filing the present petition is Rs.10,80,77,619/- which has now reached to Rs.13,85,49,940/- as on 31.03.2021 against which the Corporate Debtor, in its Reply dated 22.04.2019, stated unpaid maintenance charges of Rs.8,05,56,962/-. Pertinently, this amount was "all-inclusive total amount".

xi. It is further contended, post hearing on 16.07.2019, the Corporate Debtor filed another affidavit dated 20.08.2019 and increased the amount of unpaid maintenance charges to Rs.15,43,86,151/-. The Corporate Debtor inflated this amount by adding Exorbitant interest of Rs.4,67,10,561/- and penalty of Rs.8,66,14,184/-so as to save itself from the consequence of the Code. For example, for an unpaid outstanding maintenance charge of Rs.63/- from an apartment owner, the Corporate Debtor has levied penalty of Rs.2,07,532/-.

xii. It is further contended, considering contradictory submissions of the Corporate Debtor and unjustified interest and penalty being claimed by the Corporate Debtor, this Tribunal in its order dated 15.11.2019 inter alia issued the following directions:

> *"The Corporate Debtor shall give details of the maintenance amount outstanding in respect of any of the 384 apartment owners who are members of the RWA/Petitioner. They shall also give separately details of those apartment owners who are not in default. <u>The outstanding liabilities should be as per actuals and not with any interest or penalty</u>. It is observed that while*

the corporate Debtor may or may not be entitled to retain the onetime maintenance taken by them, the liabilities towards electricity etc. is an individual liability against the resident. The liability of one resident cannot be off set against the deposit of other residents. Therefore, the corpus of the maintenance deposit of those residents members of the RWA who are not in default should be handled over to the RWA in terms of the agreement. To come up on 25th November,2019. The Corporate Debtor shall also indicate what are the common facilities which are being provided to the residents from the one-time maintenance deposit towards Common Area Maintenance"

xiii. It is further contended, the Corporate Debtor filed revised affidavit dated 26.11.2019 wherein it admitted unpaid maintenance charges of Rs.96,02,491/- qua 364 members of the Petitioner. In this Affidavit, the Corporate Debtor has concealed the amount of Rs.3,73,84,308/-collected from these 364 apartment owners towards the Security Deposit and even after adjustment of entire outstanding maintenance charges of, the Corporate Debtor is liable to pay the balance Security Deposit of Rs.2,77,93,782/- plus interest accrued thereon but it has defaulted in payment of this amount to the Petitioner which is sufficient to initiate CIRP against the Corporate Debtor.

xiv. It is further contended that hypothetically assuming without admitting that the Corporate Debtor is entitled to adjust unpaid maintenance charges from the entire Security Deposit (and not just 25% Working Capital Loan in terms of Clause 2D of Maintenance Services Agreement) raised from the apartment owners in the Complex, the Corporate Debtor, in its own affidavits, has admitted the following liability towards the amount which needs to be transferred to the Petitioner but the Corporate Debtor has failed to do so:

No. of Apartment Owners	Total Security Deposit Raised (Rs.)	Unpaid Maintenance Charges as per the Corporate Debtor (Rs.)	Admitted Liability of the Corporate Debtor in defaulted qua Petitioner*
Affidavit dated 20.08.2019 filed by the Corporate Debtor			
~~644~~	~~6,51,36,981~~	~~2,10,61,406~~	~~4,40,75,575~~
Affidavit dated 26.11.2019 filed by the Corporate Debtor			
364 (members not in default out of 384 RWA)	3,73,84,308	96,02,491	2,77,93,782

** plus accused interest thereon @ SBI rate for 3-years term deposit.*

xv. The aforesaid amount itself, being more than Rs.1,00,000/-, is sufficient to initiate CIRP against the Corporate Debtor.

8. The Respondent/Corporate Debtor has filed its written submissions and has stated almost same statement as stated in their reply and additional affidavit except the following:

i. That the application under Section 7 of the Code can only be filed by a Financial Creditor either by itself or jointly with other Financial Creditors. In the present case, the present Application has been filed by an Association (VGRWA/Applicant) in a representative capacity of the Flat buyers/ Home buyers, which is not permissible under the Code. Placed reliance on the Supreme Court Judgment in *Civil Appeal Nos. 8337-8338 Of 2017 M/S. Innoventive Industries Ltd. Versus ICICI Bank & Anr.*

ii. It is further contended, the Hon'ble National Company Law Appellate Tribunal, in the same matter, in an appeal being Company Appeal (AT) (Insolvency) No, 21/2020, filed by the suspended director, vide its Order dated 8.1.2020 remitted the case to the Hon'ble NCLT to decide whether the Application filed by the Applicant under Section 7 of the Code i.e. the present Application fulfil the criteria of the Ordinance dated 28.12.2019.In fact, the Hon'ble Supreme Court vide its judgment dated 16.1.2021

in the matter of Manish Kumar Vs. Union of India has given 2 months to fulfil the criteria of the Ordinance dated 28.12.2019, which has not been done by the Applicant.

iii. It is further contended, assuming without admitting that an association can file an application under Section 7 of the Code, then also only a board resolution of governing board has been filed by the Applicant, which does not show any resolution been passed by 100 or 10% of the alleged Financial Creditor/ Allottees in the same class, which approves the filing of the present Application. Further, merely because an association has filed a case, would not itself fulfil the criteria of the Ordinance dated 28.12.2019 without the authority or consent of 10 % or 100 of the Financial Creditor/ Allottees in the same Class.

iv. It is further contended, the present case is covered by the judgment dt. 16.01.2021 passed by the Hon'ble Supreme Court in the matter of Manish Kumar v Union of India, WP© No. 26 of 2020 and no document has been placed on record by the Applicant to show that the present Application has been filed by Financial Creditors representing minimum 100 or10% of the Financial Creditor/ Allottees in the same class.

v. It is further contended, the debt is not a Financial Debt as defined under Section 5(8) of the Code. That as per Clause 4D of the Maintenance Service Agreement, security deposit was taken by the Corporate Debtor to ensure the performance of obligation of individual flat buyer towards payment of the maintenance bill and other charges by the Flat Buyers to the Corporate Debtor. It is stated that by any stretch of imagination the same cannot be called a financial debt. Clause 4D of the Maintenance Service Agreement is reproduced herein below:

"In order to secure due performance of OWNER(S)in Paying promptly the Maintenance Bills and other charges as raised by VFM"

vi. It is further contended, admittedly, the amount from all the Flat buyers along with the interest and delay payment charges payable

by the Flat buyers to the Corporate Debtor comes to approx. Rs 15 Crores. Supplementary Affidavit dated 20.8.2019 along with the calculation has already been filed by the Corporate Debtor.

vii. That originally the present Application has been filed by the Applicant claiming the maintenance security deposit of all 644 flat buyers for an amount of Rs. 6,51,36,981/-, however, later on the Applicant filed an affidavit dated 14.10.2019 stating that all the Flat buyers are not the member of the Association and stated that the members of Association are in default and the amount of Rs.2.77 Crs. is payable.

9. We have heard the Ld. Counsels for the petitioner and respondent and perused the averments made in the application, reply and rejoinder and additional reply filed by the respective parties as well as the written submissions filed by the respective parties.

10. In the course of hearing, Ld. Counsel for the petitioner and respondent have referred to the facts and law as mentioned in the written submissions. Therefore, it is needless to repeat the same.

11. On the basis of averments made in the application, reply, rejoinder and additional reply filed by the respective parties as well as written submissions filed by the respective parties, it is seen that the following are the admitted facts: -

i. That the petitioner is the registered welfare association of M/s Vipul Greens Residents Welfare Association and the Corporate Debtor/respondent is a builder who constructed and handed over the possession of the flats to the flat owners till 31.03.2018.

ii. The Maintenance and Operation of M/s Vipul Green Complex was earlier being carried out by the Corporate Debtor and it was handed over to the petitioner w.e.f. 01.04.2018 (as per Annexure-19, page 271 of the paper book, and the certificate issued by the Corporate Debtor).

iii. It is also admitted fact that the Maintenance Security deposit @ Rs. 50/- per sq. ft. of the super area of the flat has been deposited

by flat allottee(s), as per Clause 4(b) of the Flat Buyer's Agreement and the said amount as per the agreement shall be handed over to the society as and when the same is formed, after settlement of accounts/adjustment of outstanding amounts (Reply of Corporate Debtor page 8, para 10(d)(i)]

iv. As per Clause (D) of Maintenance Service Agreement (at page 176 of the paper book), details of the "interest bearing Maintenance Security Deposit" are quoted below: -

D. **Interest Bearing Maintenance Security Deposit:**

In order to secure due performance of OWNER(S) in paying promptly the Maintenance Bills and other charges as raised by VFM, OWNER(S) shall, at the time of taking possession of the aforesaid FLAT also deposit and keep deposited with the DEVELOPER Security Deposit (hereinafter referred to as "DEPOSIT"), calculated at the tentative rate of Rs.50/- per sq. ft. of the Super area of the said FLAT. The DEVELOPER shall transfer 25% of the said DEPOSIT, without interest, as Working Capital Loan to VFM for meeting Working Capital Requirements of VFM for maintenance of the Complex. On the balance 75% of the DEPOSIT the Developer shall pay annually interest at the rate of State Bank of India's rate for three year Term Deposit. And accordingly the Developer shall pay interest on DEPOSIT to the OWNER(S) from the date VFM starts providing maintenance services, i.e.,01.05.2007, or from the date deposits made by

Owner(s), whichever is later and all such interest together with the unused Deposit amount and the available audited / unaudited statement of accounts for the amounts utilised by VFM as Working Capital shall be handed over to the ASSOCIATION as and when the work of providing maintenance services is handed over by the Developer to ASSOCIATION and no payment or withdrawal thereof shall be allowed on individual basis to any OWNER(S). In case of any failure on part of OWNER(S) to pay the Maintenance Bills, or any other charges, whatsoever, payable on or before their respective due dates. OWNER(S) in addition to permitting the VFM/ ASSOCIATION to deny him/ her/ them the right to avail the TOTAL MAINTENANCE SERVICES, also authorises VFM to adjust the Working Capital Loan against any such defaults towards payment of Maintenance Bills.

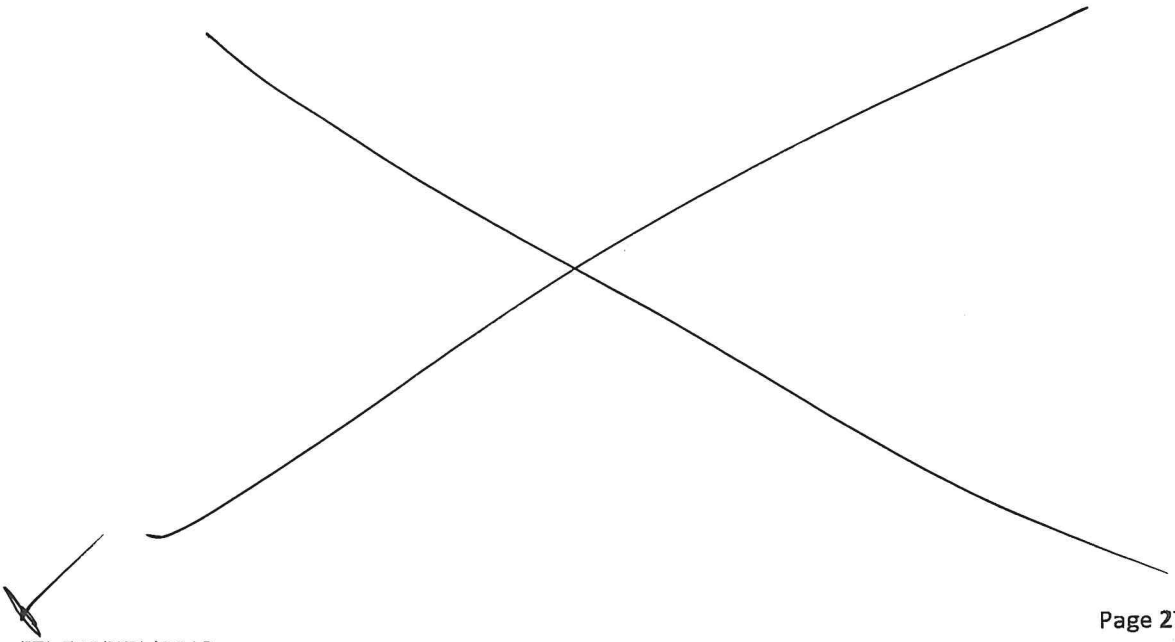
However, if on account of any adjustments the DEPOSIT falls below the agreed sum of Rs. 50/- per square ft. of the super area of the said FLAT, then OWNER(S) herein undertakes to replenish the shortfall within (15) fifteen days of demand by the VFM/ASSOCIATION.

The ASSOCIATION through General Body resolution reserves the right to reasonably increase the Interest Bearing Maintenance Security from time to time in keeping with the increase in the cost of TOTAL MAINTENANCE SERVICES or any other cost as may be decided by the ASSOCIATION and OWNER(S) agrees to pay such increases within fifteen (15) days of demand by ASSOCIATION.

If OWNER(S) fails to pay increase in the Interest Bearing Maintenance Security or to make good the shortfall as aforesaid on or before its due date, then OWNER(S) authorises the ASSOCIATION to levy a penal interest @ 15% per annum for first three months of default and in case the default continues then besides the penal interest, an additional penalty of Rs0.30/- per square feet per day shall be levied till the balance towards the Interest Bearing Maintenance Security is paid. OWNER(S) agrees and understands that the VFM shall have the lien on the FLAT in respect of the unpaid Maintenance Security Deposit and the penal interest accrued thereon. OWNER(S) also agrees and understands that the VFM can claim the amount under this Agreement and unless all the claims of the VFM are satisfied, the VFM shall have a right to disconnect the electricity connection and other utilities.

The aforesaid ASSOCIATION shall utilise DEPOSIT for meeting the contingencies arising out of non payment or delayed payment of Maintenance Charges by OWNER(S) or any other capital expenditure including, but not limited to, the replacement/ repair of Capital Assets installed in the COMPLEX.

v. Further, the clause (E) of the said agreement says that in the event of owner(s) sells or transfers or parts with possession of flat, the unadjusted Maintenance Security Deposit shall be transferred to the account of the transferee. The scanned copy of the clause (E) is quoted below: -



E. **Transfer of the aforesaid FLAT**

In the event OWNER(S) sells or transfers or parts with possession of the FLAT including tenancy during the subsistence of this Agreement, OWNER(S) shall prior to such transfer must obtain No Objection Certificate from the ASSOCIATION and the VFM and shall also provide a Deed of Adherence in the form as stated in Annexure – II, executed by the transferee in whose favour the FLAT is being transferred to ensure that the transferee adheres and conforms to all the terms of this Agreement. It shall be a condition precedent to the grant of No Objection Certificate by the ASSOCIATION/ VFM that the prospective purchaser/ transferee executes the Deed of Adherence thereby agreeing to abide by the terms and conditions as contained in this Agreement.

In the event of such a sale/ transfer, the unadjusted Maintenance Security Deposit shall be transferred to the account of the transferee unless a fresh deposit of the said security amount is made by the transferee. In case the amount is transferred to the account of the transferee, all obligations for refund of the same by the aforesaid ASSOCIATION shall stand discharged.

The Parties herein agree that in the event the said FLAT is leased by OWNER(S), it shall be incumbent upon OWNER(S) to ensure that the intending Lessee adheres and conforms to all the terms and conditions of this Agreement, at all times. However, the responsibility for payment of the Maintenance Charges envisaged herein shall be that of OWNER(S), who may cause the same to be paid by the intended Lessee on his behalf. The liability of payment of Maintenance Charges in such cases shall be joint and several.

12. The disputed points are as follows: -

i. According the Corporate Debtor, the petition is not maintainable, because there is no agreement with the association.

ii. All the flat buyers have not individually authorized the Association to file an application under Section 7 of IBC, 2016.

iii. The application is not in terms of the amendment made in Section 7 of IBC, 2016 w.e.f. 28.12.2019 which says that a Financial Creditor under clause a & b of Section 21(6A) of the code, an application needs to be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class whichever is less. Whereas the claim of the petitioner is that the petitioner is the registered Association of of more than 300 flat buyers and as per the agreement that amount was required to be handed over to the association, as and when it was formed. Therefore, the present application is maintainable.

13. Now, in the light of aforesaid facts, we consider the claim of the petitioner. The corporate Debtor has also filed an additional written submissions and enclosed the order dated 08.01.2020 passed by Hon'ble

NCLAT in Company Appeal (AT) (Insolvency) No. 21 of 2020 in the matter of Vipul Limited Vs. M/s Vipul Greens Residents Welfare Association and submitted that the Corporate Debtor had challenged the order dated 15.11.2019 passed by this Adjudicating Authority and the Hon'ble NCLAT has set aside the order dated 15.11.2019 and remitted the case to the Adjudicating Authority with a direction to decide the matter in accordance with law, taking into consideration the fact whether the claim, as made, comes within the meaning of 'financial debt' as defined under Section 5(8) and on the basis of Form-1 as filed by the applicant and not on the basis of pleading by one or other parties.

14. We have perused the order passed by the Hon'ble NCLAT in that appeal (supra) and the relevant portions of the order are quoted below: -

> *9. In view of the aforesaid insertion of provisions under explanation below Section 7, the Adjudicating Authority is only required to see whether the application under Section 7 has been filed by 100 allottees, who are members of RWA or a 10% of the allottees who are members of the allottees to maintain it. The Adjudicating Authority is required to take into consideration only the Form-1 and the enclosure therein but find out the default, if any and to proceed in accordance with law. Before the admission of the application under Section 7, the Adjudicating Authority has no jurisdiction to direct the 'Corporate Debtor' to deposit any amount to certain corpus or with regard to maintenance which may not be a subject matter of application under Section 7.*
>
> *10. For the said reason, we set aside the impugned order dated 15th November, 2019 and remit the case to the Adjudicating Authority to decide the matter in accordance with law taking into consideration the fact whether the claim, as made, comes within the meaning of 'financial debt' as defined under Section 5(8) and on the basis of Form-1 as filed by the Applicant and not on the basis of any pleading by one or other parties. The*

Adjudicating Authority is also required to notice the maintainability on the basis of insertion as made by Ordinance dated 28th December, 2019 as noticed above and then to find out whether any debt is payable in the eye of law or in fact and there is a default.

11. Except the aforesaid facts and the observations as given by the Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank– 2017 SCC OnLine SC 1025" as quoted above, the Adjudicating Authority will not go into the other facts which are required to be determined by Court of Competent Jurisdiction.

15. So far as the insertion of provision under explanation below Section 7 of IBC is concerned, on the basis of the averment made in the application, reply, rejoinder, additional reply as well as written submissions filed by the respective parties, we notice that the respondent in para 10 (c) of their reply has made the averment that ***"Be that as it may be, it is pertinent to note that the petitioner has only approximately 300 (three hundred) flatbuyers as its members out of total 644 (six hundred forty four) flats of Vipul Greens"***

16. On the basis of this averment alone, it is seen that the petitioner is representing the members of 300 flat owners, out of total 644 flats and as per the requirement of Section 7 of IBC, 2016 proviso, an application needs to be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class whichever is less. Since, the petitioner is representing 300 flat buyers, the petitioner is a registered Association duly elected by the 300 flat buyers and there is a resolution of the Association, which authorizes the petitioner to pursue the matter, in our considered view, the petitioner has fulfilled the minimum requirement for filing an application under the amended Section 7 of IBC, 2016.

17. Since the Hon'ble NCLAT in the Company Appeal (AT) (Insolvency) No. 21 of 2020 in the matter of Vipul Limited Vs. M/s Vipul Greens Residents Welfare Association in para 07 referred to the decision of the Hon'ble Supreme

Court in the matter of Innoventive Industries Ltd. v. ICICI Bank– 2017 SCC OnLine SC 1025, we would like to refer to the relevant para of that decision as below: -

> *7. In "Innoventive Industries Ltd. v. ICICI Bank – 2017 SCC OnLine SC 1025", the Hon'ble Supreme Court has already held as to how an application under Section 7 can be decided and the fact is to be*noticed. The Hon'ble Supreme Court also observed that what objection can be raised by the 'Corporate Debtor'. Relevant of which reads as follows:
>
> > *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.*
> >
> > *28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the*

applicant financial creditor. Under Section 7(2), an application is to be made under subsection (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

18. In view of that decision (Supra), in order to initiate the proceeding under Section 7 of IBC, 2016, the Adjudicating Authority has to see a) whether there is a 'financial debt' b) the 'default' has occurred in repayment of that debt or

not, c) the application is complete and whether any disciplinary proceedings is pending against the proposed RP or not.

19. At this juncture, we would like to refer to the definition of 'debt', 'financial debt' and 'financial creditor' and the same are quoted below:-

> ***Section 3 (11) of IBC : "Debt** means means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt."*
>
> ***Section 5 (8) of IBC : "Financial debt** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-*
>
> *(a) money borrowed against the payment of interest;*
>
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
>
> *(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

2[Explanation. -For the purposes of this sub-clause,-

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

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h)any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

***Section 5 (7) of IBC : "Financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

20. On plain reading of the definitions referred Supra, we find that the 'debt' means a liability or obligation in respect of a claim, which is due from any person and includes a financial debt and operational debt. And the 'financial debt is a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes the amount paid under either of the clauses from (a) to (i) of Section 5 (8) of the IBC, and the person who paid the money and *to whom such debt has been legally assigned or transferred to is known as* 'Financial Creditor'.

21. Whether a 'security deposit' comes under the definition of 'financial debt' or not? In the course of hearing, this question was raised by the parties. To examine this question, we consider the decision of the Hon'ble NCLAT in the Company Appeal (AT) (Insolvency) No. 502 of 2020 in the matter of Satish Chand Gupta Vs. Servel India Private Limited on which the Petitioner has placed reliance. The relevant portions of the order are quoted below:-

> *"36. In this connection, it is not out of place for this Tribunal to make a pertinent mention that the maturity of claim, default of claim or invocation of guarantee has no nexus with the filing of claim before the 'Interim Resolution Professional' u/s 18(1)(b) and the 'Resolution Professional' u/s 25(2)(e) of the Code.*
>
> *37. It cannot be gainsaid that the term 'deposit' includes any receipt of money by a company either as deposit or loan or in any other form by it. Under the Companies (acceptance of deposits) Rules, 2014 the term 'Deposit' is defined under Rule 2(1)(c) in an inclusive manner. The meaning of 'Deposit' is enlarged by covering receipts of money in any other form. After all, a deposit is something more than a mere loan of money.*
>
> *38. For invoking the jurisdiction of the Tribunal as per Section 74(2) under the Companies Act, 2013, even a partial failure by the Company to repay the deposit was sufficient. In fact, Section 2(31) of the Companies Act speaks of the meaning of*

deposit. Also, that the Tribunal has vide discretionary powers regarding the repayment of 'Deposit'(s) but it must exercise its discretion objectively taking into consideration all the relevant aspects in a conspectus judicial manner. In reality, the distinction between deposit and loan may not be a relevant factor for interpreting the term 'Deposit'. To put it succinctly, under the new Companies Act, 2013, the definition of the term 'Deposit' is of wider amplitude, as opined by this Tribunal.

39. The Learned Counsel for the Appellant refers to the judgement of this Tribunal dated 18.12.2020 in Co. Appl. (AT)(Ins.) 519 of 2020 in the matter of Mr. Rajnish Jain, the promoter, stakeholder and Managing Director of suspended Board of Directors V. 'Anupam Tiwari' (Resolution Professional for M/s Jain Mfg. (India) Pvt. Ltd. & Anr. wherein it is held that the 3rd Respondent therein 'BVN Traders' is a 'Financial Creditor' within the meaning of Section 5(7) of the Code and the debt in question is a 'financial debt' within the meaning of Section 5(8) of the Code.

40. It is the plea of the Appellant that the 'I&B' Code statutorily acknowledges a deposit as a form of financial debt and further that there was no denial of the fact that the amounts being with the 'Corporate Debtor' as well as of the request to arrange funds for withdrawal. In this connection, it is the stand of the Appellant that Appellant's son Vijesh Gupta sent an e.mail to Rahul Chowdhary requesting the 'Corporate Debtor' to arrange withdrawal of Rs. 20 lacs as four persons in his family (including the Appellant) had total deposits of around Rs. 70 lacs and they had a requirement of Rs. 20 lacs and thereafter he sent reminder, e.mails on 11.12.2013, 17.12.2018, 20.12.2018 and 24.12.2018 and that on 27.12.2018, Rahul Chaudhary replied that by stating

that it was not possible at that moment and that they were trying their best.

41. It comes to be known that on 05.03.2019, Rahul Choudhry, the CEO of the Respondent / 'Corporate Debtor' stated on e.mail to the Appellant's son to the effect that 'as soon as some availability is there, your requirement is on my table, and will be done as much possible. There are times in life when things get stuck. We are sitting here to find early resolutions and this confirms the Respondent / 'Corporate Debtors' admission of debt and acknowledgement of their liability of repayment.

42. On a careful consideration of respective contentions and in view of the fact that the Respondent / Corporate Debtor had accepted certain amounts from the Appellant and credited the interest in a consistent manner against such amounts for a continuous period of five years, as pleaded by the Appellant and also that the 'Corporate Debtor' had accepted money from the Appellant against the payment of interest and bearing in mind the payment of interest on the amounts borrowed by the Respondent Company is nothing but a consideration for the time value of money and in as much as the 'interest' is the compensation paid by the borrower to the lender for using the lender's money over a period of time, this Tribunal comes to an inevitable and inescapable conclusion that the Appellant's status is that of a 'Financial Creditor' as per Section 5(7) read with Section 5(8) of the Code and that there is a default in payment of the accepted amounts by the Respondent/CD and in short, the Respondent / Corporate Debtor comes within the purview of the definition of 'Financial Debt'. Viewed in that perspective, the contra view taken by the Adjudicating Authority in coming to the conclusion that the application filed by the Appellant / Financial Creditor is not maintainable for

initiation of Section 7 of the Code is clearly unsustainable in the eye of law, as held by this Tribunal, to prevent an aberration of justice. Consequently, the Appeal succeeds.

43. In fine, the instant Appeal is allowed. The impugned order of the Adjudicating Authority dated 13.02.2020 passed in (IB) 1886(ND)/2019 dated 13.02.2020 is set aside for the reasons assigned by this Tribunal, of course in this Appeal. The Adjudicating Authority is directed to restore the application filed by the Appellant / Financial Creditor / Petitioner (u/s 7 of the Code), to admit the same and to proceed further in the manner known to law and in accordance with law."

22. Now in the light of the decision (Supra), we consider the case in hand. We notice that it is an admitted fact that as per the clause (D) of the agreement at page 176 of the paper book, on the balance of 75% of the deposit, the developer shall pay annually interest at the rate of State Bank of India's rate for three years' term deposit and interest shall be paid from the date of providing maintenance services i.e., 01.05.2007 or from the date deposits are made by owner(s), whichever is later.

23. In view of this clause of the agreement, when we consider the definition of 'financial debt' referred (supra), it is seen that money was borrowed against the payment of interest and that amount was raised from the allottees under a real estate project. Hence, we are of the considered view that the amount raised by the corporate debtor comes under the definition of 'financial debt' and the petitioner, who is representing the 300 flat buyers of that project, is the 'financial creditor' in terms of Section *5 (7) of IBC* 2016.

24. From the averments made in the application as well as reply, it is also seen that the amount which has been received by the Corporate Debtor as a Maintenance Security Deposit has not been refunded as yet and as per the agreement, the Corporate Debtor is required to refund the same, the day when the Association is formed.

25. It is admitted by the Corporate Debtor in its reply that the maintenance is being carried out by the petitioner Association, w.e.f. 01.04.2018. Therefore, as per the agreement clause, the Corporate Debtor was bound to refund the amount, the day when the Association was formed. Since it is admitted by the Corporate Debtor that the Association has been carrying out the maintenance work w.e.f. 01.04.2018, therefore, the date of default is 01.04.2018.

26. At this juncture, we also consider the part-IV of the application. It is seen in the part-IV of the applicationthat the date of default is shown as 01.04.2018 and the total amount of default including interest is indicated of Rs. 10,80,77,619/-. The present application is filed on 26.02.2019, hence it is within the limitation period.

27. At this juncture, we would like to refer to the arguments advanced by the respondent. Ld. Counsel for the Respondent in the course of his arguments contended that there are some flat owners against whom, there are outstanding dues and on the basis of that, the respondent claimed that they are not liable to refund that amount. We notice that at page 29 of the reply, the respondent has enclosed the list of defaulters but in support of that the respondent has not produced any document to show that they are defaulters in making the payment. Even on the basis of that list, it cannot be presumed that all the 600 Flat buyers are defaulters.

28. At the cost of repetition, we would like to refer to the argument of the Petitioner, who in their written submissions contended that the Corporate Debtor had filed a revised affidavit dated 26.11.2019, wherein they had admitted the unpaid maintenance charges of Rs.96,02,491/- qua 364 members of the Petitioner, but in this Affidavit, the Corporate Debtor has concealed the amount of Rs.3,73,84,308/- collected from these 364 apartment owners towards the Security Deposit and even after adjustment of the entire outstanding maintenance charges , the Corporate Debtor is liable to pay the balance Security Deposit of Rs.2,77,93,782/- plus interest accrued thereon but it has defaulted in payment of this amount to the Petitioner, which is sufficient to initiate CIR Process against the Corporate Debtor.

29. So, considering these submissions, we are unable to accept the contention of the respondent that after adjusting the amounts shown in the Annexure R-II there are no outstanding dues, which are payable by the Corporate Debtor to the Financial Creditor.

30. Hence, for the reasons discussed above, we are of the considered view that there is a financial debt paid by the flat buyers, who are represented through the Registered Association and that amount has not been refunded by the Corporate Debtor as yet, therefore, there is a default in making the payments of debt amount. And in view of the decision of the Hon'ble Supreme Court in the matter of Innoventive Industries Ltd. v. ICICI Bank – 2017 SCC OnLine SC 1025, the moment, the applicant satisfies the Adjudicating Authority that there is Financial Debt or there is any default of payment, application is complete under Sub Section 2 of Section 7 and there is no disciplinary proceeding pending against the proposed IRP, the Adjudicating Authority has no option but to admit the application under Section 7(5)(a) of the IBC, 2016.

31. In the light of that judgement (Supra) we consider the case in hand and find that the applicant has succeeded in establishing that there is a financial debt and Corporate Debtor is in default in making the payment of that financial debt, the application is complete and the applicant has also proposed the name of IRP Mr. Ravi Sethia having registration number IBBI/IPA-001/IP-P01305/2018-19/12052 who has also submitted his written consent and indicated that there is no disciplinary proceeding pending against him.

32. Under such circumstances, we are inclined to admit this application and accordingly, same is hereby **Admitted and the** CIR Process against the Respondent is hereby initiated. Since the applicant has proposed the name of the IRP, therefore, we appoint **Mr. Ravi Sethia having registration number IBBI/IPA-001/IP-P01305/2018-19/12052** as IRP.:

1. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith ***prohibiting the following :-***

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate

debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

33. Financial Creditor is directed to deposit Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Financial Creditor to be recovered as CIR costs and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

34. **Registry as well as the Petitioner are directed to communicate the order to the IRP named above as well as all the persons concerned.**

-Sd-

(L.N. Gupta)
Member (T)

-Sd-

(Abni Ranjan Kumar Sinha)
Member (J)