

National Company Law Appellate Tribunal

Principal Bench, New Delhi

I.A. No. 1502 of 2020 & I.A. No. 1503 of 2020

in

COMPANY APPEAL (AT) (INSOLVENCY) No. 582 of 2020

(Arising out of Order dated 05th February, 2020 passed by National Company Law Tribunal, Principal Bench, New Delhi, in CA No. 639/2019 in C.P. No. (IB)-22(PB)/2018).

IN THE MATTER OF:

Axis Bank Limited

A Scheduled Bank included under Second Schedule of the Reserve Bank of India, Act 1934 and a Banking Company incorporated under the Companies Act, 1956.

Registered Office: Trishul 3rd Floor, Opposite Samartheshwar Temple Law Garden Ellisbridge, Ahmedabad, Gujarat – 380006, India.

...Appellant

Versus

**1. Value Infracon India Private Limited
(Under Corporate Insolvency Resolution Process)**

A Private Limited Company

**Registered Office: 715,
Naurang House, 21 K.G. Marg,
Cannaught Place, New Delhi – 110001.**

**...Corporate Debtor/
Respondent No. 1**

Through/Represented by

**Sanjay Kumar Singh
Reg No. IBBI/IPA-002/IP-N00188/2017-
2018/10505**

**Registered Office: 033, Windsor,
Grand Forte, Plot No. 76,
Sigma – 4, Greater Noida,
UP – 201310.**

...Resolution Professional

**2. Value Infra Buyers Association
4/8, Block – 4, Ashok Nagar (Tilak Nagar),
New Delhi – 110018.**

**..Resolution Applicant/
Respondent No. 2**

**Appellant: Mr. Sharad Tyagi, Ms. Yukti Makan & Ms. Gayatri,
Advocates.**
**Respondents: Mr. Sanjay Kumar Singh, (in person) for R-1/RP.
Mr. Neeraj Kumar Gupta, Advocate for R-2.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal namely *Company Appeal (AT) (Insolvency) No. No. 582 of 2020* is to the Impugned Order dated 05.02.2020, passed in CA No. 639/2019 in CP No. (IB)-22(PB)/2018 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi), dismissing the Application as devoid of merit. By the Impugned Order, the Learned Adjudicating Authority has observed as follows:-

“This is an application filed by Axis Bank Ltd. against the RP representing the corporate debtor seeking reliefs as follows:-

"a. Allow the present application, declare Applicant Ban as a ‘secured financial creditor’ in the present transaction forming subject matter of the present proceeding and direct Resolution Professional to treat present Applicant Bank as ‘secured financial creditor’ with claim amount as mentioned in Claim Form having been filed by way of "Form-C" with the Resolution Professional and accord Applicant Bank all rights and privileges of a secured financial creditor and also proportionate voting rights in the forthcoming meeting of Committee of Creditors.

b. In case if any Resolution Plan commenced the amount so received from the CD should be equally appropriated as per the proportionate share of the secured creditors.

c. In case company goes into Liquidation direct the official liquidator to distribute the sale proceeds amount as per section 53 (B) (II).

d. Direct the Resolution Professional/Liquidator, in case any amount is refunded to the home buyers, the said amount must be first utilised to pay the loan amounts as set out under the proof of claim submitted by the Applicant Bank;"

On perusal of this application, it appears this bank advanced loan to the home buyers of the corporate debtor. In view of it, now the bank is asking this Bench to pass an order declaring him a secured financial creditor of the corporate debtor and also to allow him to sit in the CoC. We are of the view that this bank cannot be called as a creditor to the corporate debtor because the loans are given to the home buyers of the corporate debtor.

Therefore, we have not found any merit in this application, hence dismissed as misconceived.

CA-2231(PB)/2020

List on 28.02.2020."

2. Succinctly put, the facts in brief are that the Section 7 Application filed by M/s. Daimler Financial Services Private Limited against the 'Corporate Debtor' was admitted on 04.05.2018; a Public Announcement was made by the IRP inviting claims on 09.05.2018; M/s. Axis Bank hereinafter referred to as the 'Appellant' filed its claim amounting to Rs.15,76,14,801/- on 20.09.2018 vide email, but the Office of the IRP refused to accept the Hard Copy; the RP rejected the document of the Appellant for want of documents on 07.10.2018; the Appellant submitted the claims once again with the relevant documents, but the same was not accepted; and thereafter the Appellant choose to file this Application before the Adjudicating Authority.

3. On 03.04.2019, the Appellant preferred an Application under Section 60(5) before the Adjudicating Authority seeking a direction to consider the

Appeal as a 'Secured Financial Creditor' for the claim amount mentioned in Form-C. The Adjudicating Authority vide the Impugned Order rejected the Application.

4. **Submissions of Learned Counsel appearing on behalf of the Appellant:**

- Learned Counsel for the Appellant vehemently contended that the Adjudicating Authority directed the RP to consider the claim of the Appellants in the light of the decree/recovery certificate issued by the Debt Recovery Tribunal (DRT) as the recovery certificates have been issued jointly against the Home Buyers and the 'Corporate Debtor'. Therefore, the Appellant who is a certificate holder in the DRT proceedings, cannot be put outside the purview of the definition of Creditor as defined under Section 3(10) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the '**Code**').
- The Successful Resolution Applicant made claim waiver from existing Security Interest/lien to be created over the Flats in favour of the Appellant by considering the claims of Home Buyers and in this situation the Appellant would neither get any money nor security for it, as invested by granting loans to Home Buyers.
- Learned Counsel argued that the allottees are getting the refund of their money under the Resolution Plan in settlement of their claims, there is a possibility that the Home Buyers would not deposit these amounts with the Appellant Banks in settlement of their dues, despite the fact that lien over the said Flat has already been acknowledged by

the 'Corporate Debtor' in its separate 'Permission to Mortgage' letter issued to the Appellant at the time of disbursement of the loans. The Appellant has given a list of 42 Home Buyers who have already transferred their respective rights under the Flats in favour of the Appellant as evident from the lien marked by the 'Corporate Debtor' in favour of the Appellant. The subrogation clause mentioned in the standard tri-partite Agreement, the Power of Attorney by the Home Buyer is in favour of the Appellant and other documents executed by the Home Buyers are also in favour of the Appellant.

- Learned Counsel placed reliance on the definitions of Sections 3(10), 5(7) & 3(34) of the Code in support of his Arguments.
- In the present case, the Appellant has advanced loan to 42 Home Buyers, out of which, the Appellant has filed recovery Applications against 41 allottees as well as the 'Corporate Debtor' before the DRT for recovery of debts.
- The Appellant holds the decree in its favour from DRT against 31 allottees as well as the 'Corporate Debtor'. Proceedings against 10 allottees are still *sub judice*.
- Learned Counsel for the Appellant vehemently denied the allegation that no due diligence was done prior to financing sanctioning of loans. He submitted that the Technical Appraisal is an internal document of the Bank and there is nothing to do with the disbursal of loans. Learned Counsel further contended that para 19 of '*Pioneer Urban Land & Infrastructure Ltd. & Anr.*' Vs. '*Union of India & Ors.*' reported in

(2019) 8 SCC 416, does not discuss security interest and therefore cannot be made applicable to the facts of the instant case.

5. **Submissions of the Learned Counsel appearing on behalf of First Respondent/Resolution Professional representing the ‘Corporate Debtor’:**

- Except for the tri-partite Agreement there is no document which has been signed by all the three parties. The liability to repay the loan is on the individual Home Buyers as stated in the tri-partite Agreement.
- The Appellant is claiming to be the ‘Secured Creditor’ and contended that they have security interest in the property of the ‘Corporate Debtor’. Admittedly no ‘charge’ was created under Section 77 of the Companies Act, 2013 in favour of the Appellant.
- The definition of the ‘Financial Creditor’ under Section 5(8) of the Code was amended to include Home Buyers as the ‘Financial Creditors’ by inserting explanation under clause 5(8)(f) and accordingly it has been provided for the real estate allottees to be recognised as ‘Financial Creditor’. It does not provide that the Banks advancing loans to the real estate allottees for booking of the Real Estate units would be considered as ‘Financial Creditors’ in any case.
- The Hon’ble Apex Court in ‘*Pioneer Urban Land & Infrastructure Ltd. & Anr.*’ (*Supra*) has observed that Home Buyers are to be considered as ‘Financial Creditors’ irrespective of the fact ‘*whether he has borrowed money from the Banks or agreed to pay instalments under the Agreement for sale or whether he does it from his own finances*’.

- The recovery certificate from DRT has been obtained by misleading DRT by pleading that the Flats are mortgaged with the Appellant. None of the units are mortgaged with the Appellant Bank. The certificates were issued ex-parte.
 - It is strenuously argued by the RP that the Appellant had never produced the entire set of documents either before the RP or before the Adjudicating Authority. Even in this Appeal, the documents pertaining to the 44 Flats have not been produced. Only an Excel Sheet has been filed praying for consideration of the claims which amounts to more than Rs.15 Crores/-.
 - The Appellant has not done any due diligence before advancing the loans. As an example, Learned Counsel contended that one Mr. Rawat was sanctioned a Loan on 30.03.2014 for Flat No. F-021, when the Project was not even approved as on that date.
 - Out of the 44 Flats, 26 Flats have already been sold and Sale Deed was executed by the 'Corporate Debtor' even before the issuance of the recovery certificate.
6. Learned Counsel for Respondent No. 2 has adopted the submissions made in the Reply of Respondent No. 1 and hence for the sake of brevity we do not wish to repeat the same.

Assessment:

7. The central point in this Appeal is whether the Appellant/M/s. Axis Bank can be considered as a 'Financial Creditor' on account of its having sanctioned and released housing loans to some of the allottees who have purchased Flats/units in the Project floated by the 'Corporate Debtor'.

8. It is not disputed that M/s. Axis Bank has sanctioned loans to 44 Home Buyers/Allottees who have purchased units/Flats, in the Project floated by the 'Corporate Debtor'. Home Buyers were included as 'Financial Creditors' vide Amendment dated 06.06.2018. Section 5(8) of the Code reads as follows:-

"5. Definitions.—In this Part, unless the context otherwise requires,—

.....

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (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 non-recourse basis;*

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

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

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

(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”

(Emphasis Supplied)

9. The Hon’ble Supreme Court in paras 18 and 19 in ‘Pioneer Urban Land & Infrastructure Ltd. & Anr.’ (Supra) has observed as follows:-

“18. It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments. This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under Section 7 and have their rightful place on the Committee of Creditors when it

comes to making important decisions as to the future of the building construction company, which is the execution of the real estate Project in which such home buyers are ultimately to be housed.

19. Shri Shardul Shroff, whose dissent was provided to us in the form of an e-mail, after finding that self-financed home buyers may be financial creditors, but a home buyer who is a borrower is not, then went on to state:

“8. If the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors.

9. Our report ought to be altered to the extent that home buyers financiers should be treated as unsecured financial creditors and they should be representatives of the home buyers. There should be no direct right given to home buyers to be on the CoC.”

Even the dissent of Shri Shroff recognises that in the case of home buyers, who have taken loans from banks, such banks ought to be on the Committee of Creditors. If such banks ought to be on the Committee of Creditors as representatives of the home buyers, and they are to vote only in accordance with the home buyer’s instructions, why should the home buyer himself then not be on the Committee of Creditors, and why should it make any difference as to whether he has borrowed money from banks in order to pay instalments under the agreement for sale or whether he does it from his own finances? These matters have not been addressed by the dissenting view which in principle, as we have seen, supports home buyers who have taken loans as against home buyers who have used their own finances. Perhaps the real reason for Shri Shroff’s dissent is the fact that unsecured, as opposed to secured, financial creditors are being put on the Committee of Creditors. If there is otherwise good reason as to why this particular group of unsecured creditors, like deposit holders, should be part of the Committee of Creditors, it is difficult to appreciate how such a group can be excluded.”

(Emphasis Supplied)

10. It is clear from the principle laid down by the Hon'ble Supreme Court in '*Pioneer Urban Land & Infrastructure Ltd. & Anr.*' (*Supra*) that it is the Home Buyer who should be considered as 'Financial Creditors' of the 'Corporate Debtor' whether he has self financed his flat or has exercised his choice of taking a loan from the Bank.

11. Additionally, we are of the considered view that as per Section 77 of the Companies Act, 2013 every security interest has to be registered with the Registrar within 30 days of its creation and admittedly no 'charge' has been created against any of the property of the 'Corporate Debtor' in favour of the Appellant. At this juncture, we reproduce Section 77 of the Companies Act, 2013 which is as follows:-

"77. Duty to register charges, etc. – (1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the chargeholder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

Provided that the Registrar may, on an application by the company, allow such registration to be made –

(a) in case of charges created before the commencement of the Companies (Amendment) Act, 2019, within a period of three hundred days of such creation; or

(b) in case of charges created on or after the commencement of the Companies (Amendment) Act, 2019, within a period of sixty days of such creation, on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within the period specified –

(a) in clause (a) to first proviso, the registration of the charge shall be made within six months from the date of commencement of the Companies (Amendment) Act, 2019, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;

(b) in clause (b) to the first proviso, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such ad valorem fees as may be prescribed.

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be, or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

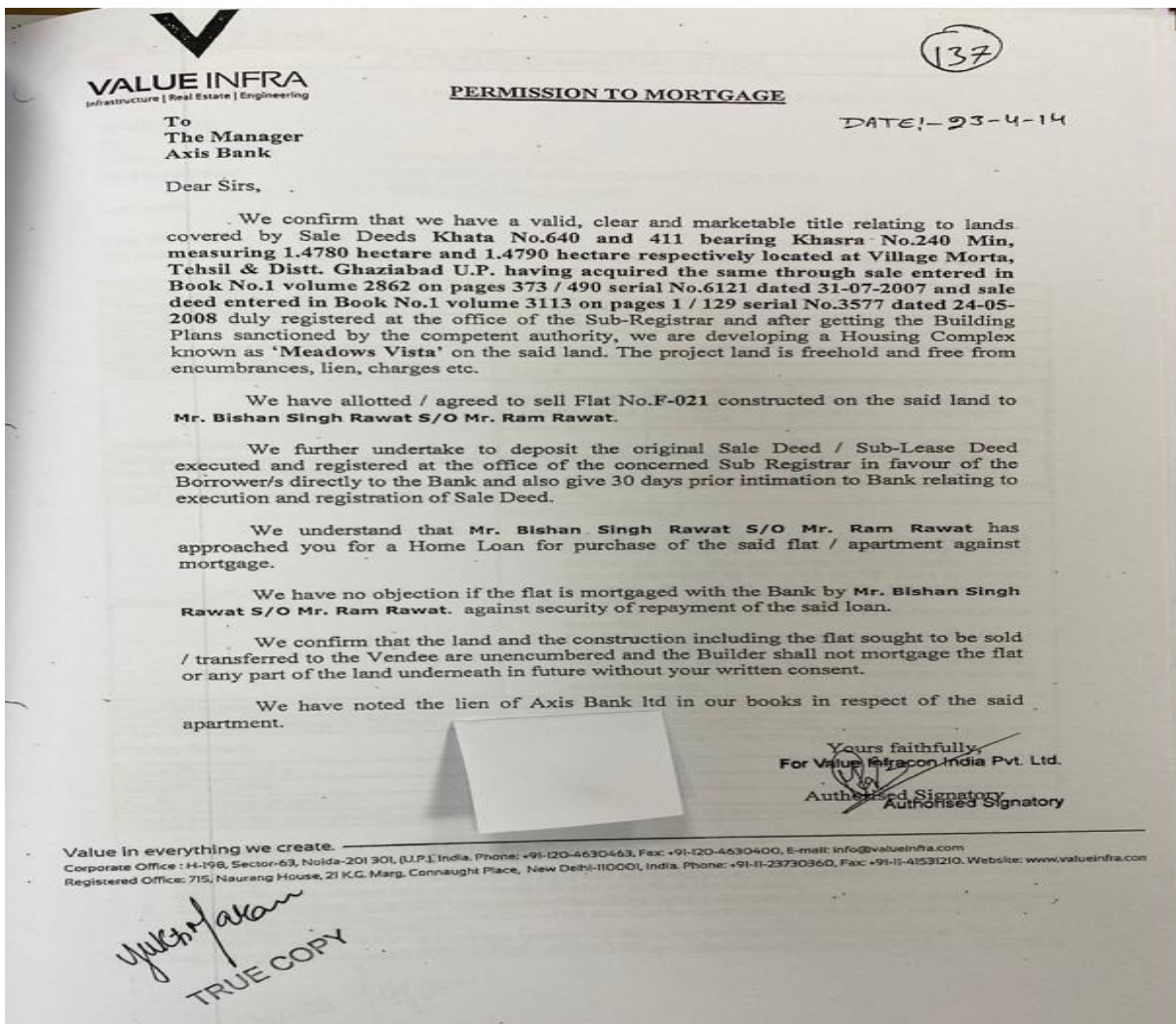
(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.”

It is not denied that there is no registered ‘charge’ created on the asset or property as contemplated under Section 77 of the Companies Act, 2013.

Further, there is no submission made on behalf of the Bank as to whether any steps were taken under Section 78 of the Companies Act, 2013. The ratio of 'Indiabulls Housing Finance Ltd.' Vs. 'Mr. Samir Kumar Bhattacharya and Anr.' passed by this Tribunal in *Company Appeal (AT) (Insolvency) No. 830 of 2019* regarding "Registration of charge" is squarely applicable to the facts of this case.

12. A perusal of the documents shows that none of the Home Buyers appeared in any of the proceedings before the DRT whereby the recovery certificates were obtained.

13. The correspondence dated 23.04.2014 addressed by M/s. Value Infracon India Private Limited to the Manger Axis Bank reads as follows:-



I.A. No. 1502 of 2020 & I.A. No. 1503 of 2020
In
Company Appeal (AT) (Insolvency) No. 582 of 2020

We find force in the contention of the Learned Counsel for the Respondent that a mere 'Permission to Mortgage' is of no relevance in the absence of not having 'registered a charge' under Section 77 of the Companies Act, 2013.

14. The relevant clause of the tri-partite Agreement entered into between the Home Buyers, the developer and the Appellant/M/s. Axis Bank is reproduced as hereunder:-

"It is agreed by and between the parties to this Agreement that in case if the BORROWER fails to honour the commitment, the developer/BUILDER shall inform the BANK and the BANK shall have the right to pay the Sale consideration and get it registered either in BANK's name or its nominee. Likewise in the event the Borrower defaults in payment of instalments then, in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the Builder and shall accordingly have the right to write to the Builder cancellation of Agreement executed between the Builder and the Borrower, where after the Bank shall have the right to pay the Sale consideration and get the subject property registered either in the Bank's name or in the name of the Bank's nominee."

15. It can be seen from the material on record that Axis Bank had rendered financial assistance for the purpose of booking units in the Project floated by the 'Corporate Debtor' and had a tie-up with the 'Corporate Debtor' for procuring business from the Home Allottees. The Home Loan Agreements in these cases were made individually by the Borrowers. As per standing instructions, the money in the account of the Home Allottees was disbursed automatically to the 'Corporate Debtor'. Tri-partite Agreement is only by way of security that the developer would withhold the allotment in the event of default by the allottee. The Bank had sought security by

creating mortgage of the residential units for the loans availed by the Home Buyers and the 'Corporate Debtor' had given permission for the same to enable the Home Buyer to procure financial assistance.

16. From the aforementioned clause in the tri-partite Agreement entered into between the Home Buyer, the Axis Bank and the 'Corporate Debtor', it is evident that in case of any default by the Borrower, the Bank would have the right to write to the builder for cancellation of Agreement executed between the developer and the Borrower, whereafter the Bank shall have the right to pay the sale consideration and get the subject property registered. There is no material on record to evidence that any such cancellation has taken place. The Home Loan Agreement read with the Demand Letters and the Allotment Letter clearly specify that when there is a 'default' on behalf of the Home Allottee a penalty interest would have to be paid by the allottee to the Bank. Therefore, the 'default' aspect is to be seen vis-a-vis the Home Allottee and the Appellant Bank only. It is contended by the Respondent that though the Allotment Letter shows that the payments were construction linked, the Bank released the entire amount prior to completion of construction.

17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a *narrow compass*. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution

and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Home Buyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case and hence we find no reasons to interfere with the well-reasoned Order of the Adjudicating Authority.

18. From all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No Order as to costs. The corresponding I.A No. 1502 of 2020 & I.A. No. 1503 of 2020 are also disposed of.

19. Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

**NEW DELHI
20th December, 2021**

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