

# REAL ESTATE REGULATORY AUTHORITY V. M/S D.B. CORP LIMITED

Real Estate Regulatory Authority  
Through its Deputy Secretary RERA Bhawan 1,  
Main RD, Zone- I, ARERA Hills, Bhopal.  
Madhya Pradesh, 462011, M.P.

...Appellant

Vs.

1. M/s D.B. Corp Limited,  
Plot No. 280, Sarkhej- Gandhinagar Highway,  
Nr. YMCA Club, Makabra  
Ahmedabad, Gujarat, India- 380051.

2. M/s AG8 Ventures Limited  
Through Mr. Anil Goel, Interim Resolution Professional/  
Resolution Professional,  
Aakriti House, E-8 Extension  
Aakriti Eco City, In front the Nest Aakriti Eco City,  
Bawadia Kalan Bhopal,  
Madhya Pradesh 462026.

...Respondents

Case No: Company Appeal (AT) (Insolvency) No.1172-1173 of 2022

Date of Judgement: 8th December, 2023

Judges:

[Justice Ashok Bhushan]

Chairperson

[Barun Mitra]

Member (Technical)

**For Appellant:** Mr. Abhijeet Sinha, Mr. Aditya Shukla, Ms. Heena Kochar, Mr. Anuj Tiwari, Mr. Swankit Nanda, Mr. Prakhar Shukla, Advocates.

**For Respondent:** Mr. Krishnendu Datta, Sr. Advocate, Mr. Ashish Verma, Mr. Rahul Gupta, Ms. Salonee Keshwani, Advocates for R-1.

Mr. Aditya Gauri, Mr. Amar Vivek, Advocates for RP.  
Mr. Keshav Sharma, Mr. Gulshan Vardhan, Mr. Mohit Singh, Mr. Praveen Agnihotri, Advocates for Intervenor.

Mr. Abhishek Anand, Ms. Kashish Rehan, Advocates for Intervenor.

Mr. Neeraj Malhotra, Sr. Advocate for Promoters.

**WITH**

Aquacity Consumer and Societies Welfare Society  
Through its Authorized Representative,  
Mr. Pradeep Roy  
Having its office at:  
House No. 1, Venus Meenakshi M Planet City,  
Bagmungalija, Bhopal, Madhya Pradesh.

...Appellant

Vs.

1. AG8 Ventures Limited  
Through its IRP Mr. Anil Goel,  
Having its office at:  
Aakriti House, E-8 Extension, Aakriti Eco City,  
Bawadia Kalan, Bhopal,  
Madhya Pradesh 462026.

2. D.B. Corp Limited,

Having its office at:  
Plot No. 280, Sarkhej- Gandhinagar Highway,  
Nr. YMCA Club, Makabra  
Ahmedabad, Gujarat, India- 380051.

...Respondents

Case No: Company Appeal (AT) (Insolvency) No.1321 of 2022

**For Appellant:** Mr. Piyush Singh, Mr. Akshay Srivastava, Mr. Vivek Kumar, Advocates.

**For Respondent:** Mr. Aditya Gauri, Mr. Amar Vivek, Advocates for RP.

Mr. Krishnendu Datta, Sr. Advocate, Mr. Ashish Verma, Mr. Rahul Gupta, Ms. Salonee Keshwani, Advocates for R-2.

Mr. Neeraj Malhotra, Sr. Advocate for Promoters.

### **Facts**

***M/s AG8 Ventures Ltd (Corporate Debtor) is a real estate company developing projects in Madhya Pradesh. It had entered agreements with M/s D.B Corp Ltd (Operational Creditor) for advertising its projects from 2010-2019. Under the agreements, D.B Corp would provide advertising services in print and other media. Payment was to be made partly in cash and partly by allotting real estate units to D.B Corp (termed as 'barter component'). Real Estate Regulatory Authority (RERA) received complaints against AG8 Ventures regarding non-refunds and non-compliance. RERA passed orders in 2020-21 directing AG8 Ventures to refund amounts to complainants. RERA also passed orders in Jan 2022 revoking registration of AG8 Ventures' Aquacity project, directing investigation into fund diversions and to deposit Rs. 81 cr in designated account. In Jan 2022, D.B Corp issued demand notice under IBC claiming operational debt of Rs. 10.77 cr against AG8 Ventures for non-allotment of 19 real estate units. D.B Corp filed Section 9 application in Feb 2022 claiming default on operational debt due to failure to allot units under barter component.***

### RERA's Arguments

Section 9 proceedings initiated collusively between D.B Corp and AG8 Ventures to save AG8 Ventures from complying with RERA's orders. Barter agreements already declared as unfair trade practices by RERA, cannot create operational debt. Majority of invoices furnished with application are fabricated with false CGST/IGST details. Only one invoice is within limitation period of 3 years. Rest barred by limitation. Non-allotment of units does not lead to operational debt payable in cash. At best, specific performance could be claimed.

### Homebuyers' Arguments

They had booked units in AG8 Ventures' Aquacity project in 2010-14 but neither got possession nor refund. National Consumer Commission ordered refund with interest. Appeals seeking interest from date of payment are pending in Supreme Court. Section 9 application is collusive, filed when refund order was challenged to avoid complying with it. CIRP will deny homebuyers refund as well as possession.

### D.B Corp's Arguments

RERA has no locus standi to file appeal against CIRP order passed under IBC. GST details in pre-GST invoices were printed from new software. Columns show nil where not applicable. Barter is common media practice, invoices are as per agreements. RERA itself termed D.B Corp as allottee. Invoices are for services provided, hence operational debt under IBC.

### Resolution Professional's Arguments

Public announcement of CIRP made, 1761 claims from homebuyers received. Committee of Creditors also constituted, first CoC meeting held.

### Court's Opinion

Locus of RERA and Homebuyers' Association to file Appeals. Consequence of CIRP and moratorium is proceedings

*against AG8 Ventures before RERA halted. But RERA questions very initiation of Section 9 process. RERA empowered under its Act to promote realty sector, protect allottees' interest. It has taken actions against AG8 Ventures. Moratorium impacts RERA's actions against AG8 Ventures. Hence it is an aggrieved party. Association of homebuyers also directly affected. They have initiated proceedings for interests. Hence aggrieved party.*

#### ***Maintainability of Section 9 Application***

*Section 9 can be filed only if there is (i) operational debt, and (ii) default in payment. Claim and operational debt under IBC refer to right to 'payment'. Expression held to mean only payment of money, not anything like barter. As per barter agreements, D.B Corp was only entitled to allotment of units against barter component. Non-allotment does not create right to payment. At best, remedy for D.B Corp was specific performance but not payment of cash or initiation of CIRP. Hence Section 9 not maintainable.*

#### **Conclusion**

*No operational debt existed. Section 9 by D.B Corp was incorrect. NCLT order set aside.*

#### ***Arguments on Collusive Proceedings and Invoices***

*Not examined since Section 9 itself is not maintainable.*

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**Court**

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#### **Full Text of Judgment:**

1. These two appeals challenges same order dated 05.08.2022 by which order the Adjudicating Authority (National Company Law Tribunal), Indore Bench, Court No.1 admitted Section 9 application filed by M/s D. B. Corp. Ltd., the Operational Creditor. Appellant in Company Appeal (AT) (Ins) No. 1172-1173 of 2022 is Regulatory Authority constituted under Section 20

of the Real Estate (Regulation and Development) Act, 2016. In Company Appeal (AT) (Ins) No. 1172-1173 of 2022 order dated 11.08.2022 appointment of Mr. Anil Goel, Interim Resolution Professional has also been challenged. Company Appeal (AT) (Ins) No. 1321 of 2022 has been filed by 'Aquacity Consumer and Societies Welfare Society' which claim to be association of 74 homebuyers who are aggrieved by the admission order dated 05.08.2022. Brief facts of the case giving rise to these appeals need to be first noted:

(i) M/s AG8 Ventures Ltd. is a registered company developing various real estate projects in the State of Madhya Pradesh. M/s AG8 Ventures Ltd. (hereinafter referred to as 'Corporate Debtor') had obtained registration of 11 real estate projects from Real Estate Regulation Authority, Madhya Pradesh (hereinafter referred to as 'RERA'). The Corporate Debtor under different real estate projects allotted various residential/commercial units to several allottees from the year 2010 onwards. The Corporate Debtor during the period 2010 to 13.08.2019 entered into various agreements titled as Barter Agreements with M/s D. B. Corp Ltd. (hereinafter referred to as 'Operational Creditor'). The Operational Creditor is engaged in business of publishing of various newspapers, periodicals and other literary and publications in print and non-print media. The Corporate Debtor entered into Barter Agreement with the Operational Creditor for extensive advertising campaign of its projects. Under the Agreement, the Operational Creditor was to advertise in media for the projects of Corporate Debtor as per terms and conditions mentioned in the Agreement. Pursuant to the Agreement, the Operational Creditor was to publish Advertisement for consideration which included cash component and Barter Component. The Cash Component against the advertising was to be paid and the Barter Component was to be utilized in form of allotment of units which were required to be transferred in favour of the

Operational Creditor.

(ii) The RERA received various complaints from allottees of the Corporate Debtor, which complaints were entertained and various orders related to different projects were passed in the year 2020-21 directing the Corporate Debtor to refund the amount along with compensation to various complainants. RERA also passed an order on 18.08.2021 under Section 35 of the RERA Act, 2016 to investigate about the diversion of funds from the designated account. Notice was also issued to the Promoter as to why the registration of the real estate project may not be cancelled. An order dated 08.01.2022 was passed by the RERA observing that the Corporate Debtor has diverted funds from the project and failed to maintain the same in designated separate account. Vide order dated 08.01.2022, the registration of the real estate project 'Aakriti Aquacity' was also revoked.

(iii) The order passed by the RERA was challenged by the Corporate Debtor before RERA Appellate Authority, which directed the Corporate Debtor to make deposit, which order was unsuccessfully challenged before the Madhya Pradesh High Court.

(iv) Other Show Cause Notices were also issued to the Corporate Debtor. Orders were also passed on 23.03.2022 by RERA revoking the registration of real estate project 'Aakriti Business Arcade' and directing for appointment of an agency for completion of the said project under Section 8 of the RERA Act, 2016.

(v) Demand Notice under Section 8 dated 13.01.2022 was issued by D.B. Corp. Ltd. to the Corporate Debtor claiming payment of Operational Debtor in Form 3 dated 13.01.2022 claiming an operational debt of Rs.10,77,17,000/- with interest relying on various Barter Agreements entered between the Operational Creditor and the Corporate Debtor.

(vi) An application under Section 9 was filed by the Operational Creditor before the Adjudicating Authority on 02.02.2022 claiming default of operational debt of Rs.10,77,17,000/- with interest consequent to the Barter Agreement entered between the Operational Creditor and the Corporate Debtor. The debt was claimed to be fell due from 13.02.2020. Some additional facts contained in Company Appeal (AT) (Ins.) No. 1321 of 2022 also need to be noted.

(vii) The Appellant – Aquacity Consumer and Societies Welfare Society claiming to be a society of homebuyers claimed to have filed two consumer complaints under Section 12(1)(b) of the Consumer Protection Act, 1986 for its members/homebuyers. Case of the Appellant was that his members have booked their respective units in the year 2014-17. It was submitted that the Corporate Debtor has siphoned of the money collected from the buyers of the project. The NCDRC allowed both the Consumer Complaints and directed the Corporate Debtor to refund the amount collected from the homebuyers along with interest of 9% pa from the date of possession.

(viii) Civil Appeals bearing no. CA 7872/2021 and CA 402/2022 were filed before the Hon'ble Supreme Court by the Appellant Association for modification of the order of NCDRC to the extent that the interest should be from the date of payment and not from the date of possession. In the Appeals notices were issued. In the Civil Appeal before the Hon'ble Supreme Court adjournment was sought by the Corporate Debtor on 11.04.2022 to place the payment plan along with counter affidavit.

(ix) The Company Petition which was filed by the Operational Creditor came for hearing before the Adjudicating Authority on 05.05.2022, on which date the Adjudicating Authority directed the matter to be listed for final arguments on 07.07.2022. The Operational Creditor filed an early hearing application in the Company Petition, on which application the matter was posted for 17.06.2022, which was again adjourned to 07.07.2022. On



07.07.2022, the matter was heard by the Adjudicating Authority and order was reserved.

(x) In the Company Petition, the Corporate Debtor filed an affidavit in reply where it expressed its inability to make the payment of the Operational Creditor. The Corporate Debtor also expressed its willingness to pay admitted Principal Amount of Rs.5,25,89,000/-. The Adjudicating Authority noticing that the Demand Notice was sent which was not replied by the Corporate Debtor and the Corporate Debtor having admitted the debt to the extent of Rs.5,25,89,000/- admitted Section 9 application and imposed moratorium under Section 14(1) of the I&B Code. Aggrieved by the order dated 05.08.2022, these two Appeals have been filed.

2. We have heard Shri Abhijeet Sinha, learned counsel for the Appellant appearing in Company Appeal (AT) (Ins) No. 1172-1173 of 2022 filed by RERA and we have heard Shri Piyush Singh, learned counsel appearing for the Appellant in Company Appeal (AT) (Ins) No. 1321 of 2022. Shri Krishnendu Datta, learned senior counsel has appeared for the Operational Creditor – D. B. Corp. Ltd. Shri Aditya Gauri and Shri Amar Vivek, learned counsel have appeared for the Resolution Professional. We have also heard Shri Neeraj Malhotra, learned senior counsel and other learned counsels who had filed different IAs in these Appeals.

3. Company Appeal (AT) (Ins) No. 1172-1173 of 2022 came for consideration before this Tribunal on 30.09.2022, on which date notices were issued in the Appeal and impugned order dated 05.08.2022 was stayed. Following order was passed on 30.09.2022:

*“O R D E R*

*30.09.2022: Learned counsel for the Appellant submits that by the impugned order dated 05.08.2022 the Adjudicating Authority has admitted section 9 application filed by Respondent No.1 –*

*'M/s D.B. Corp. Ltd.'* (Operational Creditor). It is submitted that the Section 9 proceedings were collusively initiated and because of the fact the Appellant, the Regulatory Authority, has passed orders against the real estate company – the Corporate Debtor, to avoid the consequences of said orders application under Section 9 has been filed. It is further submitted that invoices which has been filed by the Operational Creditor in support of his claim are forged invoices. Learned counsel for the Appellant submits that the Operational Creditor claims in Section 9 application that Corporate Debtor under the agreement under barter system to allocate certain flats/units to the Operational Creditor. He submits that the Regulatory Authority itself has disapproved such procedure and its process. Learned counsel for the Respondent submits that the Appellant (Regulatory Authority) has itself in certain other matters has recognized barter system.

*Be that as it may, on the grounds which has been pleaded in the Appeal, we permit leave to the Appellant to file this Appeal.*

*Issue notice. Learned counsel for Respondent No.1 accepts notice. He prays for and is allowed three weeks' time to file Reply.*

*Issue notice on Respondent No.2, who may also file reply within three weeks.*

*List this Appeal on 15.11.2022 alongwith company appeal filed with Dairy No. 39947 of 2022. In the meantime, the order dated 05.08.2022 shall remain stayed."*

4. In Company Appeal (AT) (Ins) No. 1172-1173 of 2022 reply has been filed both by the Operational Creditor and the Corporate Debtor. In Company Appeal (AT) (Ins) No. 1321 of 2022 reply has been filed by the IRP to which rejoinder has also been filed.

5. Shri Abhijeet Sinha, learned counsel appearing for the RERA, Appellant in Company Appeal (AT) (Ins) No. 1172-1173 of 2022 submits that application filed under Section 9 by the Operational Creditor was an application filed in collusion with the Corporate Debtor so that Corporate Debtor may wriggle out from its obligation as imposed by various orders passed by RERA under 2016 Act. It is submitted that the Appellant is a Statutory Authority constituted under 2016 Act which is bound to protect and preserve rights of allottees. It is submitted that very basis of Section 9 application i.e. Barter Agreement has already been declared as unfair practices by RERA by its order dated 12.05.2022. It is submitted that there was no operational debt due against the Corporate Debtor on basis of which application under Section 9 could have been maintained by the Operational

Creditor. It is submitted that under the Barter Agreements which are basis for initiation of Section 9 proceeding, the cash component has already been paid to the Operational Creditor and against the Barter Component, the Operational Creditor had claimed allotment of units. Allotment of units under Barter Agreements cannot be operational debt to enable the Operational

Creditor to initiate Section 9 proceeding against the Corporate Debtor. The invoices which were filed along with the Section 9 application were all forged and fabricated invoices prepared for the purposes of the case. It is submitted that invoices are claimed to be for year 2010 to 2017, however, the invoices which are filed along with Section 9 application even of the year 2010 contains column for CGST and IGST while the Goods and Services Tax came into force only on 01.07.2017. A bare look on the invoices reveal that the invoices have been prepared after 01.07.2017 for the purposes of the case. The Operational

Creditor has fabricated the invoices with the sole purpose of initiating corporate insolvency resolution process against the Corporate Debtor. It is submitted that the invoices were never relied upon while issuing Demand Notice under Section 8. The

Corporate Debtor and the Operational Creditor have entered into unfair trade practice and relied on illegal agreement to initiate CIRP against the Corporate Debtor. The Operational Creditor has also ascertained its right as allottee before RERA, hence, it is not open for them to initiate CIRP claiming to be Operational Creditor against the Corporate Debtor. The proceeding under Section 9 initiated by the Operational Creditor is clear abuse of process of law. Application on the strength of Barter Agreement, as filed by the Operational Creditor, if permitted, the same will defeat the object and purpose of the I&B Code. The Adjudicating Authority failed to notice that the Operational Creditor cannot fall within the definition of Operational Creditor under Section 5 (20) of the I&B Code. It is submitted that out of list of 210 invoices filed along with the Section 9 application only one invoice dated 29.08.2019 was within three years from filing of Section 9 application, whereas all other invoices were beyond three years and were barred by time.

6. Learned counsel for the Appellant in support of Company Appeal (AT) (Ins) No. 1321 of 2022 has adopted the submission advanced by Shri Abhijeet Sinha, learned counsel appearing for RERA. It is further submitted the Appellant who are homebuyers of the real estate project plotted by Corporate Debtor have paid the amount to the Corporate Debtor between years 2010-2014 which amounts were siphoned off by the Corporate Debtor and possession of respective units was never given to the homebuyers. On the complaints filed before the NCDRC, orders were passed for refund of amount along with 9% interest. Aggrieved by part of the order by which interest was directed from the date of possession, Appeals were filed being Civil Appeals No. CA 7872/2021 and CA 402/2022, in which appeals the Hon'ble Supreme Court has issued notices. In the Civil Appeals, the Corporate Debtor appeared before the Hon'ble Supreme Court and sought adjournment to place the repayment plan, however, during the said period the Company Petition was got collusively filed by the Corporate Debtor

through Operational Creditor, which was admitted on 05.08.2022. It is submitted that the Appellant is aggrieved by the order since by initiation of the CIRP, Appellant homebuyers shall neither get their amount back nor shall be able to receive possession of the allotted units. It is submitted that timing of filing of Section 9 application itself indicate that it has collusively done to benefit the Corporate Debtor and save him from discharging his statutory obligation.

7. Shri Krishnendu Datta, learned senior counsel appearing for the Operational Creditor refuting the submission of learned counsel for the Appellant submits that RERA has no locus to file the Appeal as RERA is a regulatory authority which could have no grievance against initiation of CIRP against the Corporate Debtor by the impugned order dated 05.08.2022. It is submitted that mention of CGST and IGST in the invoices prior to 01.07.2017 were due to reason that invoices were printed from a new software which contains CGST and ITST number. It is, however, submitted that with regard to invoices prior to 01.07.2017 column of CGST and IGST are nil. The Operational Creditor is a responsible newspaper and Barter Agreement is common media practice. The RERA has itself declared the Operational Creditor as allottee on the basis of Barter Agreement. It is submitted that invoices were issued in pursuance of Barter Agreement which was agreement for services rendered by the Operational Creditor and is covered within the definition of operational debt as per Section 5(20) and 5(21) of the I&B Code, the Operational Debt having arisen out of the services provided to the Corporate Debtor.

8. Learned counsel for the Resolution Professional submits that in furtherance of initiation of CIRP a public announcement was made on 12.08.2022 and homebuyers/allottees of the Corporate Debtor have filed their claims. The Interim Resolution Professional has received 1761 claims from the

creditors in class i.e. allottees/ homebuyers. The IRP has also constituted the Committee of Creditors and first meeting of the Committee of Creditors has already been held on 09.09.2022.

9. Shri Neeraj Malhotra, learned senior counsel advanced submissions in I.A. No. 4406 of 2023 and I.A. No. 284-285 of 2023. In I.A. No. 284-285 of 2023, the applicant has sought impleadment and clarification of order dated 30.09.2022. In I.A. No. 4406 of 2023 applicant Hemant Kumar Soni has sought stay of imposition of penalty by RERA during pendency of Company Appeal (AT) (Ins.) No. 1172-1173 of 2022.

10. I.A. No. 4156 of 2022 has been filed by the IRP for clarification of order dated 30.09.2022 passed in Company Appeal (AT) (Ins.) No. 1172-1173 of 2022. I.A. No. 760 of 2023 has also been filed by the IRP. I.A. No. 83-84 of 2023 has been filed by one Vishwa Bandhu Sharma seeking impleadment in Company Appeal (AT) (Ins.) No. 1172-1173 of 2022. Applicant Vishwa Bandhu Sharma claims to be allottee/homebuyer in project Aakriti Aqua City.

11. We have considered the submissions of learned counsel for the parties as well as learned counsel appearing in different I.As, as noted above and perused the record. From the submissions of learned counsel for the parties following questions arise for consideration in these appeals:

1. Whether Real Estate Regulatory Authority has locus to file Company Appeal (AT) (Ins.) No. 1172-1173 of 2022 challenging the order dated 05.08.2022 under Section 61 of the I&B Code?

2. Whether Aquacity Consumer and Societies Welfare Society, Appellant in Company Appeal (AT) (Ins.) No. 1321 of 2022 has locus to file Appeal within the meaning of Section 61 of the I&B Code?

3. Whether the Corporate Debtor owed operational debt to the Operational Creditor on the basis of Barter Agreements and consequent invoices to enable the Operational Creditor to

initiate proceedings under Section 9 of the I& B Code?

4. Whether the application under Section 9 filed by the Operational Creditor was filed in collusion with the Corporate Debtor to save the Corporate Debtor from carrying out its statutory obligations?

5. Whether invoices which were filed along with the Section 9 application by the Operational Creditor were manufactured and forged invoices prepared for the purposes of the case, which were not genuine invoices?

Question No. I

12. Section 61 of the I&B Code, 2016 provides for an Appeal by "any person aggrieved by the Order of the Adjudicating Authority". Section 61, sub- Section (1) uses the expression "any person aggrieved". Learned Counsel for the Operational Creditor has questioned the locus of the Real Estate Regulatory Authority to file an Appeal under Section 61 of the Code challenging the Impugned Order dated 05th August, 2022. The submission is that the Appellant is a Real Estate Regulatory Authority under the Real Estate Regulation and Development Act, 2016 and has only regulatory role as contained in the enactment. By Order of the Adjudicating Authority initiating 'Corporate Insolvency Resolution Process' against the Corporate Debtor and imposing the moratorium, Regulatory Authority cannot be held to be aggrieved since the moratorium comes into play by statutory provisions of the Code and has applicability on all proceedings covered by Section 14 of the Code.

13. Mr. Krishnendu Datta, Sr. Advocate has also in support of his submission placed reliance on various Judgments of this Tribunal and Hon'ble Supreme Court which we shall refer hereinafter.

14. There can be no dispute that moratorium as declared under Section 14 of the Code has effect on institution of suits and

continuation of pending suits or proceedings against the Corporate Debtor including the execution of Judgment, Decree or Order. The consequence of moratorium is that Orders passed by RERA cannot be executed against the Corporate Debtor but only on said consequences it cannot be said that RERA can be said to be aggrieved by the declaration of moratorium. Moratorium is consequential to the initiation of proceedings under Section 9 or under Section 7 of the Code.

15. The Appellant's case in the Appeal is that initiation of proceedings under Section 9 by the Operational Creditor is a collusive proceeding which is apparent from the fact that the Corporate Debtor admitted its debt in its affidavit of Reply and did not contest the proceedings. Several Orders were passed by RERA against the Corporate Debtor including the investigation under Section 35 of the RERA Act, 2016 and direction to deposit amount of Rs. 81 Crores in the designated account, the corporate debtor to save itself from various proceedings sought protection under the moratorium. The further case of the Appellant is that there is no operational debt on basis of which Section 9 Proceeding can be initiated. The RERA is thus aggrieved not by consequence of the moratorium but is questioning the very initiation of Section 9 proceeding which according to the Appellant is not in accord with the provisions of the Code. The Ground is that there being no operational debt and D.B. Corporation Limited being not operational creditor within meaning of IBC, the Adjudicating Authority committed jurisdictional error in admitting Section 9 Application.

16. The RERA has been constituted under Section 20 of the Real Estate Regulation and Development Act, 2016 to exercise the powers conferred on it or assigned to it under the Act. Section 32 of the Act elaborates the functions of authority for promotion of Real Estate Sector. One of the functions entrusted to the Authority is protection of interest of the allottees, promoters



and real estate agents. Section 34 of the Act provides that function of the authority shall include, to register and regulate Real Estate Project and Real Estate Agent registered under the Act. Real Estate Regulatory Authority thus is statutorily entrusted to promote the real estate sector and to protect the interest of the allottees.

17. In the facts of the present case where Regulatory Authority has come up in the Appeal questioning the very maintainability of Section 9 Application and further alleging that Section 9 Proceedings are collusive proceedings between Corporate Debtor and Operational Creditor, can it be said that it has no locus to file an Appeal?

18. The obvious consequences of admission of Section 9 Application and declaration of moratorium is that all proceedings before RERA against the Corporate Debtor has to come to a grinding halt. RERA is a statutory authority under Section 20 sub-section (2). RERA is a body corporate and is entitled to sue or to be sued in its name. RERA is thus fully competent to sue

in its name and it has questioned the order on grounds as enumerated in paragraph 9 of the Appeal. We make it clear that question of locus to file an Appeal as an aggrieved person and the question as to whether appeal filed by the aggrieved person is to succeed, are two different questions and the question of locus is not dependent on success of the grounds in the Appeal.

19. We may now revert to the cases which have been relied on by Learned Counsel for the Operational Creditor in support of his submission that Appellant is not aggrieved person.

20. Learned Sr. Counsel Mr. Krishnendu Datta has relied on Judgment of this Tribunal in Company Appeal (AT) Ins. No. 1194 of 2022, Securities & Exchange Board of India Vs. Rajesh Sureshchandra Sheth & Ors. which was an Appeal filed by SEBI challenging an order of admission under Section 7 of the Code filed by Operational Creditors. SEBI was opposing initiation

on

the ground that it has already initiated proceedings under the Corporate Debtor by order dated 29.02.2016 and has issued recovery certificate. This Tribunal held that the grounds raised by SEBI to oppose the initiation cannot be held to be sufficient grounds. In paragraph 15 of the Judgment, following has been observed:

*“15. This Tribunal thus has clearly held that initiation of proceeding under IBC cannot be nullified by any order passed by SEBI. Thus, the proceedings initiated by SEBI by order dated 29.02.2016 and the Recovery Certificate issued thereunder and steps taken by the SEBI cannot be a ground to oppose the initiation of proceedings under Section 7 of IBC”*

21. It is relevant to notice the observations in paragraph 15 as quoted above were observations of the Court on merits of the Appeal. In the above judgment, this Tribunal has not laid down that SEBI has no locus to file the Appeal in fact it was not even contended before the Tribunal that SEBI is not aggrieved person against the Order of initiation of CIRP Process. The above judgment thus does not help the Appellant in support of submission that RERA has no locus to file the Appeal.

22. Another judgment relied on by Learned Counsel for the Operational Creditor is “Company Appeal (AT) Ins. No. 103 of 2023, Insolvency and Bankruptcy Board of India Vs. GTL Infrastructure & Ors.” where IBBI filed an appeal challenging the order of the Adjudicating Authority dismissing Section 7 Application which was filed by the Canara Bank. This Tribunal took

the view that Canara Bank had already filed an Appeal challenging the Order of the Adjudicating Authority in which notices have been issued by this Tribunal. The Appeal filed by the IBBI was held not to be maintainable. In paragraph 5 and 6 of the Judgment, following has been observed by this Tribunal:

*“5. At the outset, Counsel for the Appellant has been asked as to how the Appellant Board is an aggrieved person especially when the aggrieved person (Canara Bank) has already filed the appeals i.e. CA (AT) (Ins) No. 68 & 69 of 2023. In merely requested that the present appeal may be re-notified to be heard along with aforesaid two appeals on 17.03.2023. However, from the perusal of the memorandum of appeal, we could not find the cause of concern much less the grievance of the Appellant for preferring the present appeal especially when the appeals have already been filed by the aggrieved person. In this regard, we may also refer to an order passed by this Tribunal in the case of Insolvency and Bankruptcy Board of India Vs. Wig Associates Pvt. Ltd. & Ors., 2018 SCC Online NCLAT 386, in which the Tribunal has recorded its displeasure while noticing the fact that the appeal has been filed by the board as an aggrieved person which was held to be not maintainable.*

*6. In our considered opinion as well, the Appellant has nothing to do with the litigation between two parties i.e. ‘Financial Creditor’ and ‘Corporate Debtor’, in order to challenge the impugned order by which the petition filed by the Financial Creditor has been dismissed for whatever reasons.”*

23. It is relevant to notice that in the present case the RERA has taken various actions against the Corporate Debtor and various orders passed by RERA were to be complied by the Corporate Debtor and it was only due to continuation of CIRP Process against the Corporate Debtor that RERA could not have proceeded further to initiate compliance of its order. This Tribunal in

paragraph 6 of the above judgment took the view that IBBI has nothing to do with the litigation between two parties i.e. ‘Financial Creditor’ and ‘Corporate Debtor’ whereas in the present case the RERA who had already issued various orders against the Corporate Debtor has to do with the corporate debtor and was directly involved with the enforcement of the

RERA Act qua the Corporate Debtor hence the Judgment of this Tribunal in the case of IBBI (supra) is clearly distinguishable.

24. We may also notice certain orders passed by RERA before initiation of Section 9 Proceedings by the Operational Creditor before the Adjudicating Authority. RERA on various complaints received from the allottees in the year 2021 has registered proceedings against the Corporate Debtor. A show cause notice dated 09.09.2021 was issued to the promoter of the project Aakriti Aquacity under Section 7 of the 2016 RERA Act as to why allottees should not be refunded deposit amount and compensation need to be paid and why action cannot be taken to revoke the registration of the project Aquacity for non compliance of the Orders. Reply was submitted by the Corporate Debtor in October, 2021. Investigation Report from Financial Advisor was also obtained which report mentioned that the amount received by the promoter has not been deposited in the prescribed bank account and order dated 28th January, 2022 was passed by RERA against the Corporate Debtor and its Directors Mr. Raju Soni and Mr. Hemant Kumar Soni. Further, the Adjudicating Authority issued following directions in paragraph 42 to 49 of the Order:

*“42. Keeping in view the facts available on record in the case and the information provided by the appellant to the Authority from time to time, on the basis of the above discussion, this Authority comes to the conclusion that:*

*i. 37 orders regarding refund of deposited amount and payment of compensation have not been complied with by the appellant and 13 orders have been complied with only partially. Thus, the appellant has violated rule 18.*

*ii. From the date of coming into force of section 4 of the Act, 01.05.2017 till date, 70 percent of the amount received from the allottees has been received by the appellant as per section 42) clause (1VD) of the Act PROJECT LO REAL ESTATE has not been deposited in the special bank account created for the*

project as per clause (1) (D) of section 4 (2) read with rule 5. As on

30th September, 2021, in the special bank account created for the project, the amount required by section 4 (2) clause (1) (D) read rule:5 is only zero as compared to the amount of Rs 7718 lakh. Thus, the appellant has continuously contravened the provisions of this section after the commencement of section 4 of the Act.

43. In the context of the above findings, in order to protect the interests of the allottees and for the purpose of getting the project completed as soon as possible, the appellant is directed to:

I. And according to the orders of the adjudicating officer, the payment of the amount should be made to the allottees by 31.03.2022.

II. As per the provisions of section 4 (2) of section (1) (D) read rule 26 of the Act, the amount deposited less in the special account of the project, Rs 81 crore should be definitely deposited in the project account by 31.03.2022.

44. The amount deposited by the allottees and the interest and compensation payable thereon has not been paid within the time limit of 2 months after the order of the authority and the adjudicating officer. In exercise of powers under Section 38 of the Act, Shri Dhiman Narayan Shukla, (Retired District Judge) Enforcement Officer, RERA is authorized under Section 81 of the Act to determine the penal interest payable for the period of delay.

45. That the deposited amount of the allottees and the returning of interest on it and not complied the order passed in section 18, and by using the right of sub section 61 of section 38, Rs.60 lakh on the appellant in exercise and Rs. 350 Lakhs A penalty of 350 lakhs is imposed.

46. Revocation of registration of the project in question due to non-compliance of rule 18 and noncompliance of rule 18 after the date of coming into force of rule 5 read in section 4 (2) of section (1) (D) of the Act of registration) is also ordered

to be done.

47. In the case under consideration on the point of diversion of funds received from the allottees. Since the serious doubts remain in the investigation so far, it is necessary that a thorough scrutiny of the financial records of the promoter be continued. This is also necessary because funds will be required to complete the remaining work of the project and this amount can be obtained from those sources in which the amount received from the allottees has been diverted promoter. Therefore, by Mr. the Milind Waikar, Financial Adviser, Authority will continue its investigation with regard to the financial accounts of the Promoter and the Promoter will continue to provide him with the records and information sought by him. Shri Milind Waikar, Financial Adviser will keep the Authority informed from time to time about the findings of its investigation, so that the Authority can take legal action accordingly.

48. Necessary action should be taken by the Secretary, Authority as per clause (a), (b) and (c) of section 7(4) of the Act.

49. In exercise of the power conferred by clause (d) of section 7(4) of the Act, the appellant is directed that the authority selected by the authority under section 8 for completion of the project the proper financial help will be provided."

25. In view of the sequence and events of the facts which took place and various proceedings drawn by RERA much prior to issuance of notice under Section 8 of the Code by the Operational Creditor, we are satisfied that Appeal filed by the RERA cannot be thrown out on the ground of locus. The RERA held to be aggrieved person within the meaning of Section 61 of the Code.

26. Thus, the Question No. I has to be answered in affirmative holding that RERA has locus to file Company Appeal (AT) Ins. No. 1172-1173 of 2022.

## Question No. II

27. The Appellant who has filed Company Appeal (AT) Ins. No. 1321 of 2022 is association of home buyers of a registered Real Estate Project developed by the Corporate Debtor. The Members of the Appellant were allotted units in the year 2010-14 and they were promised possession of their respective units in the year 2014-17. Appellant association being aggrieved by the Corporate Debtor has filed the consumer complaints before the National Consumer Disputes Redressal Commission on which order was passed on 27.10.2021 directing the Corporate Debtor to refund with interest at the rate of 9% from the date of possession is handed over. The order dated 27.10.2021 was assailed by the Appellant Aqua City Consumer and Social Welfare Society by Civil Appeal No. 7872 of 2021 in so far as the direction was issued to make payment of interest from the date of possession. Learned Counsel for the Appellant has also handed over the copy of the Order of the Hon'ble Supreme Court dated 17.10.2022 passed by the Hon'ble Supreme Court in Civil Appeal No. 7872 of 2021 where the Appeals filed by the Appellant has been allowed and the direction was issued that compensation shall be payable to each of the homebuyers with 9% interest per annum from the date when deposit was made over to the Respondent. Appellant aggrieved by the Order dated 05th August, 2022 has filed the Appeal. It is not even contended by the Respondent that Appellant Aquacity Consumer and Social Welfare Society is not an aggrieved person. Appellant being association of the home-buyers of Real Estate Project who has already initiated proceedings for direction of the interest of the home-buyers is aggrieved person within the meaning of Section 61 of the Code and the Appeal filed by the Appellant cannot be dismissed on the ground of locus.

28. We thus answer Question No. II in affirmative holding that Aquacity Consumer and Social Welfare Society has a locus to file an Appeal under Section 61 of the Code against the Order dated 05th August, 2022.

Question No. III

29. Before we enter into the rival submissions of Learned Counsel for the parties, we may first notice the particulars of the operational debt as given in Part-IV of the Section 9 Application filed under Form-5. It is the case of the Operational Creditor that the Corporate Debtor entered into various Barter Agreements with the Operational Creditor which Barter Agreements were enclosed with the Section 9 Application. It is useful to extract Part-IV of the Application which is as follows:

PART- IV
PARTICULARS OF OPERATIONAL DEBT



1

TOTAL AMOUNT OF  
DEBT,  
DETAILS OF  
TRANSACTION  
ON ACCOUNT OF WHICH  
DEBT  
FELL DUE,

Rs,.10,77,17,000/- (Rupees Ten Crore Seventy Seven Lakhs Seventeen Thousand) along with interest @ 18% p.a. The Operational Creditor is in the business of publishing various newspapers, periodicals and other literary and publications in print and non-print media and authorised licensee of radio broadcasting and is operating FM Stations throughout India and the Corporate Debtor is engaged in the business of acquiring, developing, constructing and sale of real estate projects. The Corporate Debtor was desirous of conducting extensive advertising campaign of its various projects and for which the Operational Creditor and Corporate Debtor entered into various barter agreements, the details of which are mentioned as under :

Sr. No.	Date	Total Consideration
1	13.08.2019	25,50,000/-
2	15.10.2017	1,31,15,000/-
3	02.06.2016	1,90,83,772/-
4	01.08.2014	30,50,000/-
5	28.03.2014	3,00,00,000/-
6	25.03.2013	2,00,00,000/-
7	01.10.2012	1,50,00,000/-
8	18.07.2011	2,00,00,000/-
9	29.09.2010	2,00,00,000/-

	<p>AND THE DATE FROM WHICH SUCH DEBT FEE DUE</p>	<p>Copies of Barter Agreements are enclosed herewith and marked as Annexure A-4 (Colly). As per the aforementioned Barter Agreements, it was agreed between the Operational Creditor and Corporate Debtor that in lieu of advertisement services provided by the Operational Creditor, the Corporate Debtor shall pay partly in the form of cash/cheque (hereinafter referred as "Cash Component") and partly in the form of transfer/sale of units (hereinafter referred as "Barter Component") to the Operational Creditor. That, in compliance of the aforementioned agreements, the Operational Creditor has duly provided the agreed advertisement services to the Corporate Debtor from time to time and the Corporate Debtor has duly paid the cash component to the Operational Creditor but failed to transfer/sale the units (barter component) as agreed between the parties. That, out of the total barter component value for 41 units aggregating to Rs.11,73,36,000/- (Rupees Eleven Crore Seventy Three Thirty Six Thousand), the commitment for 22 units aggregating to Rs. Rs.6,47,47,000/- (Rupees Six Crore Forty Seven Lakhs and Forty-Seven Thousand) was only discharged by the Corporate Debtor and were handed over to the Operational Creditor beyond the agreed time period. The remaining 19 units aggregating to Rs. 5,25,89,000/- (Rupees Five Crore Twenty Five Lakh Eighty Nine Thousand) are still not handover to the Operational Creditor. That, the Operational Creditor has provided advertisement services aggregating to Rs. 11,74,22,441.911- (Rupees Eleven Crore Seventy Four Lakh Twenty Two Thousand Four Hundred ' Forty One and Ninety One Paise) in respect of the Barter Component. Copies of invoices are enclosed herewith and marked as Annexure A-5 (Colly). Despite of the clear understanding and constant follow ups by the Operational Creditor with the Corporate Debtor with regards to delivering the possession of the units on time, the Corporate Debtor failed to meet its commitments and paid no heed towards the vehement requests of the Operational Creditor. That, despite of the request and reminders, the Corporate debtor did not paid any attention towards the payment of amount and resultant to which the Operational Creditor sent a Legal Notice dated 30.12.2021 through their counsel. Copy of Legal Notice dated 30.12.2021 is enclosed herewith and marked as Annexure A6. That, in response to the aforesaid legal notice, the Corporate Debtor had admitted that they are trying to make the remaining payment in respect of the unit not allotted but they deliberately denied the payment of interest on delayed possession of 22 units. Copy of reply to legal notice is enclosed herewith and marked as Annexure A-7. Thereafter, Demand Notice in Form 3 under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for payment of outstanding debt was sent to Corporate Debtor by email dated 13.01.2022. Simultaneously, said demand notice was also sent by speed Post on 13.01.2022 at the registered office of the Corporate Debtor and the same was duly delivered on 14.01.2022 and the said demand notice has not been disputed or replied by the Corporate Debtor till date. Copies of Demand Notice dated 13.01.2022 alongwith email, postal receipt and consignment report are enclosed herewith and are marked as Annexure A-8 (Colly). Debt falls due with effect from 13.02.2020.</p>
<p>2</p>	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)</p>	<p>Rs. 10,77,17,000/- (Rupees Ten Crore Seventy Seven Lakhs Seventeen Thousand) along with Interest @ 18% p.a. The default occurred on the last date i.e. 13.02.2020 on which the possession were required to be given by the Corporate Debtor as per Barter Agreement dated 02.06.2016 (Computation of outstanding amount due from Corporate Debtor is enclosed herewith and marked as (Annexure A-9)).</p>

30. As per Barter Agreement in lieu of the advertisement

services

provided by the Operational Creditor the Corporate Debtor had to pay partly

in the form of cash and partly in the form of transfer sale of units to the

Operational Creditor. It has been further submitted that cash component has

been paid fully but the corporate debtor had failed to transfer sale of the units

(Barter Component as agreed between the parties).

31. 'Barter' has been defined in Law Lexicon, by P Ramanatha Aiyer to the following effect:

*"Barter. To exchange one commodity for another. (Tomlin) Barter is exchange of wares for wares. (Terms de la Ley; Cowell) Also the thing given in exchange. The exchange of goods and/or services without the intervention of money."*

32. Along with the Section 9 Application, invoice pertaining to Barter Component were annexed aggregating to Rs. 11,74,22,441/-. It was further submitted that Corporate Debtor failed to deliver the possession of the units leading to the Operational Creditor giving "Demand Notice" dated 13.01.2022. The Barter Agreement which is very basis of the Demand Notice as well as Section 9 Application have been annexed along with the Section 9 Application as well as in the Reply filed by the Respondent No. 1 in this Appeal. There are nine Barter Agreements between the parties beginning from 29th September, 2010 and last being 13th August, 2019. It is sufficient to notice the terms and conditions of the Barter Agreement dated 13th August, 2019 for considering the nature of transaction between the parties. Barter Agreement is entered between DB Corporation Ltd. and AG8 Ventures Limited which is executed on stamp duty of Rs. 1000. Clause C of the Barter Agreement reads as follows:

*"C. The Owner & Advertise is desirous of conducting an*

*extensive advertising campaign, including of its Project (as defined below) in DBCL Media (as defined below). In consideration of DBCL agreeing to permit the Owner & Advertiser to advertise in DBCL Media, the Owner & Advertiser has agreed to barter and transfer the Said Unit (defined below) and getting the sale deed thereof registered in favour of DBCL simultaneously with execution of this Agreement."*

33. Article 2 of Barter Agreement provides for agreement to advertise. Clause 2.3 that owner & advertiser shall be entitled to publish, order, advertise in DBCL Media for aggregate of Rs. 25,50,000/- out of which Rs. 2 Lakhs shall form the cash component and Rs. 23, 50, 000/- thousand shall form the Barter Component. Clause 2.3 is as follows:

*"2.3 Pursuant to this Agreement and subject to conditions precedent as provided for in clause 2.1 hereinabove, the Owner & Advertiser shall be entitled to publish advertisements in DBCL Media for the Aggregate Commitment of Rs. 25,50,000/- (Rs. Twenty Five Lakhs and Fifty Thousand Only) including GST, out of which Rs. 2,00,000/- (Rs. Two Lakh Only) shall form the cash component ("Cash Component") and Rs. 23,50,000/- (Rs. Twenty Three Lakhs and Fifty Thousand Only) shall form the barter component (Barter Component). The bifurcation of total Cash Component and Barter Component in INR would be as per Schedule I ("DBCL Deliverables and Rates") and Annexure 'A' appended to Schedule I proves the list of deliverables with respective rates agreed amongst parties for consumption during first 12 (twelve) months of term. The Owner & Advertiser agrees to consume the deliverables according to the specified time lines mentioned in Schedule I."*

34. Article 3 deals with invoices and payments. Clause 3.1 and 3.2, 3.3, and 3.4 are as follows:

*"3.1 Upon the release of an advertisement of the Owner & Advertiser/Affiliate, DBCL shall raise its invoice ("Invoice") to the Owner & Advertiser for an amount calculated on the basis of rates mentioned in Schedule I.*

3.2 The Parties hereby agree and undertake that the billing of the Cash Component and Barter Component will be done separately.

3.3 The parties agree that the Owner & Advertiser shall make payment of the invoices with respect to Cash Component of the deal at the time of signing this Agreement. The Owner & Advertiser agrees and undertakes that it will comply with provisions of the GST Act.

3.4 The Parties hereby agree and undertake that 100% ("Utilised Amount") of every Invoice raised by DBCL with respect to Barter Component shall be set off against the Total Consideration of the Said Unit payable by DBCL to the Owner & Advertiser"

35. Clause 4.1 deals with sale of the said unit which is as follows:

"4.1 The Owner & Advertiser has allotted and after full set off of the Total Consideration against the Barter Component of the Aggregate Commitment, shall sell/transfer the Said Unit in the Project to DBCL or its nominee. The Said Unit shall have the specifications as shown in the specification sheet attached hereto as Schedule 7."

36. Clause 4.2 and its sub-clauses states as follows:

"4.2.1 The Said Unit is free from all encumbrances and claims by third parties;

4.2.2 Till the time DBCL issues a letter discharging the Owner & Advertiser from its liabilities to DBCL, DBCL's charge over the Said Unit shall continue to subsist and the Said Unit shall continue to be a subject matter of this Agreement;

4.2.3 The charge of DBCL over the Said Unit under this Agreement shall extend to any outstanding dues of Owner & Advertiser/Affiliate or any entity represented by the Owner & Advertiser from time to time."

37. Article 7 deals with termination of the agreement.

Schedule I giving details of Barter Component, cash component and total deal value. Schedule I of the Agreement is as follows:

SCHEDULE I DBCL DELIVERABLES AND RATES			
Client		AG 8 Ventures Limited	
Barter Component		23,50,000	
Cash Component		2,00,000	
Total Deal Value		25,50,000	
Project		Aakriti Nest	
Flat No.		STUDIO APARTMENT FLAT NO. 205	
Deal Period		23 Months	
	Consumption	14th August 2019 to 13th August 2020 (Deliverables as per details below*)	14th August 2020 to 13th July 2021 (To be discussed and agreed upon mutual consent)
As per Annexure A	Barter Component (Amount in Rs.)	11,75,000	11,75,000
	Cash Component at the time of Agreement (Amount in Rs)	2,00,000	

Total agreed Spend for the First Year	(Amount in Rs)	13,75,000	11,75,000
Total Agreed Spend for 23 Months (Term)		25,50,000/-	
*GST Included in the above amount			

The Owner & Advertiser should ensure to consume the deliverables according to the specified timelines mentioned in Schedule I

\*Above rates are inclusive of GST”

38. From the pleadings in Part-IV of the Section 9 Application as noted above, it is clear that Application has been filed by the Operational Creditor on the foundation that the Corporate Debtor although had discharged the cash component but barter component has not been discharged and out of Barter Component of Rs. 11,73,36,000/- commitment for 22 Units aggregating to Rs. 6,47,47,000 were discharged and remaining 19 units aggregating to Rs. 5,25,89,000/- are still not handed over to the Operational Creditor which pleadings have already been extracted above in Part-IV.

39. Now question to be answered is as to whether there was any operational debt due on the corporate debtor for which Section 9 Application could be initiated by the Operational Creditor as per the provisions of IBC. The Operational Debt and Operational Creditor are defined under Section 5(20) and 5(21) of the Code which are as follows:

*“5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; 5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any*

*State Government or any local authority;"*

40. The definition of Operational Debt refers to "a claim". The claim has been defined in Section 3(6) as in following words:

*"3(6) "claim" means-*

*(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured."*

41. When we look into the definition it is clear that both sub-clause 'a' and 'b' refers to "a right to payment". The claim must subsist for a debt being debt to become operational debt must relate to a right to payment unless operational creditor has a claim i.e. a right to payment against the corporate debtor, no operational debt can arise to enable Operational Creditor to initiate

proceeding under Section 9 of the Code. The claim of Section 8 and Section 9 also indicates that proceedings under Section 9 by Operational Creditor can be initiated for payment of unpaid operational debt. Section 8(1) uses expression "demanding payment of the amount involved in the default" whereas Section 8(2)(b) uses the expression "the payment of unpaid operational debt" thus non-payment of operational debt is sine qua non for giving any demand notice under Section 8 of the Code leading to Section 9 also makes it clear that after the expiry of period of 10 days from the date of delivery of notice, sub-section 1 of Section 8 of the Code states if the Operational Creditor does not receive payment from the Corporate Debtor, operational Creditor may file an application for initiating a Corporate Insolvency Resolution Process, thus not receiving the payment from the Corporate Debtor is a condition precedent



for initiating Section 9 Application.

42. Learned Counsel for the Appellant Mr. Abhijeet Sinha has contended that the Operational Debt in the present case cannot arise from Barter Agreement where under the Agreement what was agreed between the parties was allotment of units and allotment and sale of units in lieu of the Barter Component. The payment of unpaid operational debt relates to payment of money when we look into the pleading of the operational creditor, it is clear that what is pleaded is that non-discharge of Barter Component under which component the operational creditor was entitled for allotment of units and sale of the units. According to the own case of the Operational Creditor against the total Barter Component of Rs. 11,74,22,441/- which related to 41 units only commitment of 22 units have been discharged and commitment for remaining 19 units have not been handed over to the Operational Creditor, non-handing over of the 19 units against the Barter Component cannot lead to operational debt nor as per the agreement between the parties Operational Creditor can start asking for cash component of the Barter Component, which component was only for purposes of allotment of the units to the Operational Creditor. How the Barter Component which was to be subsumed for allotment of units can convert itself into cash component is neither explained nor is permissible as per the agreement between the parties. The Operational Creditor at best according to own pleading was entitled to further 19 units as per the Barter Agreement and for non-allotment of 19 units, the Operational Creditor could have taken recourse in law including suit for specific performance of contract but how the non-allotment of 19 units shall lead to entitlement of payment of money to the Operational Creditor is unexplained and it is not permissible as per agreement between the parties, there being no entitlement for any payment by the Operational Creditor as per Barter Agreement between the parties is against the Barter Component. We are satisfied that there was no operational debt due for which payment in money

can be asked for by the Operational Creditor.

43. Learned Counsel-Mr. Abhijeet Sinha has placed reliance on Judgment in Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Limited & Ors. (2022) 1 SCC 401 in which case the Hon'ble Apex Court has occasion to consider the expression "payment" as occurring under Section 30(2) of the IBC. The expression 'payment' the amount to be paid came for consideration before the Hon'ble Supreme Court one party asserted that expression payment referred only to payment in monetary terms whereas other party contended that payment is with respect to reference to discharge of obligation and that could be brought about by any of the methods permissible in law and not necessarily by way of payment in terms of money alone. In paragraph 162 of the Judgment, Hon'ble Supreme Court noticed the rival contentions of the parties with regard to expression payment which is as follows:

*"162. In the present case, the resolution plan has, in the first place, stated that according to the estimate of the resolution applicant, the liquidation value to be received by the dissenting financial creditors was likely to be nil but then, has provided for discharge of any likely obligation towards them in the manner that they shall be provided a proportionate share in the equity of Expressway SPV and land parcels but not any payment in terms of money. The dissenting financial creditor, ICICI Bank, is thoroughly dissatisfied with such a prescription whereby its dues shall be satisfied by a mode other than direct payment in cash.*

*On the other hand, the IRP, the resolution applicant and even the assenting financial creditor would assert that such a prescription satisfies all the essential requirements of Section 30(2)(b) and Regulation 38(1)(b). Both these provisions essentially use the expressions "payment"; "the amount to be paid"; "the amount payable"; and "shall be paid". ICICI Bank asserts that these expressions refer only to the*

*payment in monetary terms, whereas the submissions are countered with the assertions that the term "payment" is with reference to discharge of obligation and that could be brought about by any of the methods permissible in law and not necessarily by way of payment in terms of money alone. This takes us to the principles of interpretation and assigning appropriate meaning to the expressions used."*

44. The expression payment as occurring in Section 30(2) was explained by the Hon'ble Supreme Court and it was held that the expression "amount payable" referring only to sum of money and not anything else. In paragraph 164 and 164.1, following has been held:

*"164. Taking up the provisions under debate, it is but clear that as per sub-section (2) of Section 30, the resolution plan ought to provide for certain payments; and first of that is the insolvency resolution process costs. An action of "payment" being that of discharge of an obligation by delivery of money or other valuable thing accepted in discharge of obligation, one could at once notice that proposing to pay the insolvency resolution process costs in any form other than money would be an exercise in absurdity. Such a payment has to be in terms of money alone. Then comes clause (b) whereby and whereunder, the resolution plan is to provide for payment of debts of operational creditors and the minimum quantum is specified in terms of 'amount to be paid' or 'amount that would have been paid' with reference to the event of liquidation and/or distribution in terms of Section 53 of the Code. Here again, if any proposition is suggested for payment of debts of operational creditors by way of something other than money, and that too in the form of equities in the other corporate entities to be carved out of the corporate debtor, that would not be shunning off the debts of operational creditors but would only be keeping them glued to the corporate debtor or its successor entities. Such a method of*

*payment could least be a step towards insolvency resolution. The same features, with necessary variations, would apply to the second part of clause (b) of sub-section (2) of Section 30 in regard to the dissenting financial creditors. The operational creditors as also the dissenting financial creditors are to be paid in terms of the amount to be determined with reference to Section 53 of the Code and are to be paid in priority, as described in Regulation 38(1) of the CIRP Regulations. 164.1. Therefore, when, for the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code, the dissenting financial creditors are to be "paid" an "amount" quantified in terms of the "proceeds" of assets receivable under Section 53 of the Code; and the "amount payable" is to be "paid" in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression "payment" is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such money by enforcement of security interest, as per the entitlement of the dissenting financial creditor."*

45. Hon'ble Supreme Court had also occasion to refer Section 8 of the IBC which was held to be also a provision for money transfer and not by other mode. In paragraph 166.5, following has been laid down:

*"166.5. The other submissions and counters with reference to the phraseology of Section 8 of the Code do not require much dilation because, the said provision essentially relates to the dues of an operational debtor and the steps envisaged before commencement of insolvency resolution process. Nevertheless, "payment" for the purpose of the said provision is also of money transfer; and not by any other mode."*

46. The Hon'ble Supreme Court has also occasion to use expression "Barter". In paragraph 167 of the Judgment while reiterating its view that expression "payment" occurring in Section 30(2) only refers to payment of money and not anything of its equivalent in the nature of Barter. Paragraph 167 is as follows:

"167. To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of sub-clause (ii) of clause (b) of sub-section (2) of Section 30 (read with Section 53), in our view, the expression "payment" only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution. We are not commenting on the scenario if the dissenting financial creditor himself chooses to accept any other method of discharge of its payment obligation but as per the requirements of law, the resolution plan ought to carry the provision as aforesaid."

47. To reiterate what was held by the Hon'ble Supreme Court in above paragraph is that expression payment only refers to the payment of money and not anything of its equivalent in nature of Barter; when construing the same expression of payment in Section 30(2), the Hon'ble Supreme Court has held that payment

refers only to payment of money and not anything of its equivalent in the nature of Barter, the same interpretation has to be put to Section 8 and 9 also of the Code.

48. Thus, what can be an operational debt for purposes of Section 8 and 9 is an Operational Creditor which involve payment of money as noticed above the foundation of Section 9 Application is Barter Component under which agreement barter component remained unfulfilled and as per Barter Agreement against the Barter Component the Operational Creditor was entitled for allotment of the units and non-allotment of the units against the Barter Component cannot make the DB Corporation Limited as an Operational Creditor nor any payment of money can be claimed by the Operational Creditor as against non-discharge of Barter Component as per the agreement between the parties themselves as noted above.

49. We thus are satisfied that there was no operational debt due on the corporate debtor on which operational creditor can claim payment of money from the corporate debtor to enable it to issue a demand notice under Section 8 or to file Section 9 Application before the Adjudicating Authority. We thus are satisfied that entire initiation of proceedings under Section 9 by the

Operational Creditor is contrary to the scheme of IBC and no payment of money was due on the corporate debtor on basis of which unpaid dues any proceedings under Section 9 can be initiated.

50. We thus answer Question No. III in following manner:

i. On the basis of Barter Agreement and consequent invoices, non-discharge of Barter Component by the Corporate Debtor shall not lead to any operational debt on basis of which payment of money can be demanded by the Operational Creditor from the Corporate Debtor. No operational debt was owed to the Operational Creditor in the facts of the present case hence initiation of proceedings under Section 9 by the Operational

Creditor was contrary to the provisions of the IBC.

Question No. IV & V

51. While considering Question No III we have already held that there was no Operational Debt due on the Corporate Debtor and the proceedings initiated by the Operational Creditor being wholly outside Section 8 and 9 of the Code, we see no necessity to enter into Question No. IV & V for the purpose of the present case.

52. In view of the foregoing discussions and conclusions, we are of the view that Application filed under Section 9 by the Operational Creditor alleging Operational Debt was non-maintainable since there was no operational debt on basis of which payment of money could have been demanded by the Operational Creditor from the Corporate Debtor on account of non-discharge of Barter Component by the Corporate Debtor. At best, the Applicant was entitled for claiming allotment of units as per the Barter Agreement between the parties for which it was open for the Operational Creditor to take such remedy as permissible. However, Section 9 Application was clearly not maintainable, the Adjudicating Authority committed error in

admitting Section 9 Application without adverting to the real nature of the transaction between the parties, which is the very basis of the Section 9 Application, the Order of the Adjudicating Authority just is unsustainable.

53. In result, we allow both the appeals, set aside the Order dated 05th August, 2022 admitting Section 9 Application. Both the Appeals having been allowed, no orders are necessary in different IAs, as noted above. The IAs are disposed of. Parties shall bear their own costs.