NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.165 of 2024

(Arising out of Order dated 09.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I in C.P.(IB) No.291/MB/2023)

IN THE MATTER OF:

Deepak Raheja & Anr. …Appellants

Versus

Omkara Asset Reconstruction Pvt. Ltd …Respondent

Present:

For Appellants : Mr. Ajesh K. Shankar, Ms. Shweta Bharti, Mr. Srihari S., Ms. Suneha, Mr. Rohit Jolly, Ms. Bheeni Goyal and Mr. Raghav Sachdev, Advocates.

For Respondents : Mr. Arun Kathpalia, Sr. Advocate with Mr. Varun Kalra, Mr. Samir Malik, Mr. Shahan Ulla, Mr. Ryan Dsouza, Ms. Diksha Sharma, Advocates for R-1.

Mr. Gaurav Mitra, Sr. Advocate with Mr. Ishaan Roy Choudhury and Ms. Honey Satpal, Advocates for IRP.

With

Company Appeal (AT) (Insolvency) No.212 of 2024

(Arising out of Order dated 09.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-I in C.P.(IB) No.290/MB/2023)

IN THE MATTER OF:

Advantage Raheja Hotels Pvt. Ltd. & Anr. …Appellants

Versus

Omkara Asset Reconstruction Pvt. Ltd. & Anr. …Respondents

Present:

For Appellants : Mr. Ajesh K. Shankar, Ms. Shweta Bharti, Mr. Srihari S., Ms. Suneha, Mr. Rohit Jolly, Ms. Bheeni Goyal and Mr. Raghav Sachdev, Advocates.

For Respondents : Mr. Krishnendu Datta, Sr. Advocate with Mr. Varun Kalra, Mr. Samir Malik, Mr. Shahan Ulla, Mr. Ryan Dsouza and Mr. Rahul Gupta, Advocates for R1.

Mr. Gaurav Mitra, Sr. Advocate with Mr. Ishaan Roy Choudhury and Ms. Honey Satpal, Advocates for RP a/w Mr. Aakash Parikh and Mr. Jay Sanghrajka.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) challenge the orders dated 09.01.2024 passed by National Company Law Tribunal, Mumbai Bench, Court-I, initiating Corporate Insolvency Resolution Process (**"CIRP"**) against the two Corporate Debtors, running two Hotels - (i) JW Marriott (five- star Hotel) situated at Bengaluru; (ii) Crown Plaza Hotel, situated at Pune.

2. Company Appeal (AT) (Ins.) No. 165 of 2024 has been filed by Suspended Director of the Corporate Debtor – GSTAAD Hotels Pvt. Ltd.; and Company Appeal (AT) (Ins.) No. 212 of 2024 has been filed by Shareholder and Suspended Director of the Corporate Debtor – Neo Capricorn Plaza Pvt. Ltd., a subsidiary of M/s GSTAAD Hotels Pvt. Ltd. Lenders of both the Corporate Debtors being common and lending commenced by a common Loan Agreement dated 26.12.2017 and both the Appeal(s) involving common issues of facts and law, have been heard together and are being decided by this common judgment

3. Brief facts of the case giving rise to these Appeal(s) are:

Company Appeal (AT) (Ins.) No.165 of 2024

(i) Piramal Capital Housing Finance Ltd. (**"Piramal"**) entered into a Loan Agreement dated 26.12.2017 with Corporate Debtor (**"CD"**) - M/s GSTAAD Hotels Pvt. Ltd. ("**GSTAAD Hotels**") and Neo Capricorn Plaza Pvt. Ltd. (**"Neo Capricorn"**), agreeing to extend Term Loan Facility of Rs.600 crores, wherein GSTAAD was granted loan of Rs.450 crores, Rs.50 crores as revolving facility and Neo Capricorn was granted a loan of Rs.100 crores. Rate of interest was 10.5% (per annum) payable every month. In case of default interest of 1.25% per month was payable.

(ii) On 17.01.2018, a Cash Management Agreement was entered between Piramal and GSTAAD Hotels (Borrower), whereby 66% of the revenue of the Hotel was to be transferred into the Revenue Account and 34% of the Revenue Account was to be transferred into a Retention Account, to be used for service of debt under the Facility Agreement.

(iii) As per Loan Agreement dated 26.12.2017, there was a Debt Service Retention Account ("DSRA") where Rs.8 crores remained undisbursed in order to meet any shortfall.

(iv) The Corporate Debtor – GSTAAD Hotels continued to service its Loan Agreement till March 2000. After the onslaught of Covid-19, GSTAAD Hotels availed ECLGS Facility of Rs.98 crores on 30.12.2020 at the interest rate of 13% per annum. The principal amount was repayable within four years.

Moratorium of one year was also granted. Another ECLGS Facility II was granted to GSTAAD Hotels on 11.03.2022 of Rs.65 crores, repayable within five years with moratorium period of two years.

(v) On 10.08.2021, IDBI Trusteeship Ltd. filed a Company Petition against the CD – GSTAAD Hotels being CP(IB) No.1292 of 2021 before the NCLT Mumbai Bench, in respect of default under the Loan Agreement dated 26.12.2017. Company Petition - CP(IB) No.1292 of 2021 was withdrawn on 13.12.2022. On 27.12.2022, Lenders assigned their all rights under Loan Agreement, ECLGS Facility-I ("ECLGS-1") and ECLGS Facility-II ("ECLGS-2") to Omkara Asset Reconstruction Company Pvt. Ltd. (**"Omkara"**).

(vi) On 15.12.2023, Omkara issued a legal notice, calling upon the CD to repay the amount of Rs.666,53,26,968/-. A Company Petition under Section 7 being CP(IB) No.291/MB/2023 was filed by the Omkara against GSTAAD Hotels, claiming debt and default on 15.11.2022.

(vii) GSTAAD Hotels filed a Writ Petition No. 6037 of 2023 before the Karnataka High Court, challenging the assignment dated 27.12.2022 seeking a declaration that there being no default in repayment of loan facility and the account of the CD not having been declared as NPA or stressed account, the loan account could not have been assigned to Omkara and certain other reliefs were also claimed in the Writ Petition.

(viii) The CD – GSTAAD Hotels asked for statement of account to close the loan account and repay the balance amount. The Lenders continued to receive sums as per Cash Management Agreement.

(ix) Reply to Section 7 Application was filed by the CD. The Adjudicating Authority vide order dated 09.01.2024 admitted Section 7 Application.

Company Appeal (AT) (Ins.) No.212 of 2024

(i) On 26.12.2017, Corporate Debtor - Neo Capricorn Plaza Pvt. Ltd. along with GSTAAD Hotels entered into a Loan Agreement for a loan of Rs.600 crores, out of which Corporate Debtor – Neo Capricorn was to be given loan of Rs.100 crores loan. On 26.12.2017, a Security Trustee Agreement was entered into between the Lender – Piramal, the Corporate Debtor and M/s. IDBI Trusteeship Services Ltd.

(ii) On 29.12.2020, the Lender entered into a Loan Agreement with the Corporate Debtor – Neo Capricorn Plaza Pvt. Ltd. for a sum of Rs.19.5 crores under the ECLGS Scheme.

(iii) On 04.03.2021, IDBI Trusteeship Ltd. issued a notice of default, calling on GSTAAD Hotels and the CD – Neo Capricorn to repay Rs.13 crores to the Lender. On 26.05.2021, the IDBI Trusteeship Ltd. issued a notice of default to the GSTAAD Hotels and Neo Capricorn to repay the entire loan of Rs.600 crores.

(iv) A Company Petition being CP(IB)No.1287 of 2021 was filed on 23.10.2021 against the Neo Capricorn by IDBI Trusteeship Ltd. for initiating Section 7 proceedings. On 22.12.2022, Section 7 Application filed by IDBI Trusteeship Ltd. was withdrawn.

(v) Lenders assigned their rights on 27.12.2022 for a sum of Rs.625 crores to Omkara. On 30.01.2023, the Lender – Piramal provided the Borrowers a Statement of Accounts, giving a concession of about Rs.132 crores towards the loan account.

(vi) On 15.02.2023, Omkara issued a recall notice for recalling the loan, without enumerating any default/ date sought to recall the entire loan. The recall notice was replied on 20.02.2023.

(vii) On 09.03.2023, CP(IB) No.290 of 2023 was filed by Omkara against the CD – New Capricorn. The CD expressed its willingness to repay the loan, which was recorded by the NCLT on 11.10.2023. The CDs – GSTAAD Hotels and Neo Capricorn wrote to the Lenders in October and November 2023 asking for statement of accounts to close the accounts and replay the same. From 25.10.2023 to 09.11.2023, the Lender continued to receive the amount as per Cash Management Agreement.

(viii) On 09.01.2024, order was passed by Adjudicating Authority admitting Section 7 Application against the CD – Neo Capricorn.

These two Appeal(s) have been filed challenging the separate order dated 09.01.2024 passed in Section 7 proceeding as noted above. For deciding both the Appeal(s) it shall be sufficient to refer to facts and pleadings in Company Appeal (AT) (Ins.) No.165 of 2024.

4. We have heard learned Counsel for the Appellant(s) as well as learned Counsel for Respondents appearing for Omkara and learned Counsel appearing for the IRP. The submissions advanced by learned Counsel for the Appellant(s) being common, we proceed to consider the submission as submissions on behalf of the Appellant. The submission of learned Counsel for Respondent – Omkara, being also common in both the Appeal(s), they are referred to as submissions of Respondent.

5. Learned Counsel for the Appellant challenging the orders initiating CIRP submits that CD – GSTAAD Hotels is a running Hotel namely - JW Marriott (a five-star Hotel) in Bengaluru, which Hotel is being run as a profitable Company, which can be envisaged from earnings before interest, taxes, depreciation and amortization (EBIDTA) in the year 2022-23, which was Rs.81.26 crores. The learned Counsel for the Appellant referring to the details of revenue earned by the Hotel, in Company Appeal (AT) (Ins.) Nos.165 and 212 of 2024, referred to in paragraphs 7.5 and 7.6 submits that subsequent to Covid-19, the Hotel has substantial earnings

and has been making substantial payments to the Lenders. The learned Counsel for the Appellant referring to Cash Management Agreement ("**CMA**") submits that as per the CMA 34% of daily gross revenue from the revenue account was to be transferred in the retention account, which Agreement provided reconciliation of accounts on monthly basis, whereby, only the amounts equivalent to the Corporate Debtor's profit share from the Hotel were to be utilized by the Lender to service its loan and in event an amount in excess of the Corporate Debtor's profit entitlement from a particular month, the Lender was obliged to transfer back the excess amount to the Expense Account within 10 days. In paragraph 7.10, the details of amount repaid to the Lenders from 2017-18 to 11.01.2024 are mentioned, which is about Rs.418 crores for GSTAAD and Rs.78.92 crores for New Capricorn. Learned Counsel for the Appellant submits that accounts of the Corporate Debtors were never declared as SMA account or NPA account, hence, the accounts having never been declared as NPA, there was no occasion to assign the debt to Omkara. It is submitted that as per the Loan Agreement dated 26.12.2017, as per Clause 9, there was 'Debt Service Reserve Amount' (**"DSRA"**), where Rs.8 crores for the Corporate Debtor GSTAAD Hotels had to be kept as undisbursed, in order to meet any shortfall. If any sum of the DSRA was used, the DSRA would be replenished from the amounts in 34% of the CMA and The Lender was obliged to maintain the DSRA amount or upon a Notice by the Lender to the Borrowers repayment thereof was to be made to maintain the reserve. The Lender never issued any Notice to the Borrower to replenish the DSRA. The entire sum of 34% of the CMA is in

control of the Lender – Piramal (Now Financial Creditor – Omkara/ Respondent No.1). Hence, it was upon them to first adjust the sums due strictly as per the Agreement.

6. The earlier Section 7 Application filed by IDBI Trusteeship Services Ltd. being CP(IB)No.1292 and 1287 of 2021 having been withdrawn, without taking any liberty to file afresh Section 7 Application, Section 7 Applications filed by Omkara was barred by principle of *res-judicata* and issue estoppel. The sanction under ECLGS Scheme on 29.12.2020 and 11.03.2022 clearly holds that CD was eligible for facility and account was not NPA and hence, it met the requirement of ECLGS. Under the ECLGS, an amount of Rs.98 Crores and Rs.65 crores were received by GSTAAD Hotels, totaling to Rs.163 crores out of which Rs.140 crores were utilized by the Lenders to evergreen their account. As per Financial Statement of ECLGS-1, which reflects on 05.10.2022, the sum due was only about Rs.52 crores and as on 16.02.2023, the amount due was Nil. It is submitted that for the sake of arguments, even if there was a repayment of the principal of the ECLGS-1 due between October 2022 to February 2023, as per the repayment schedule, which was never demanded, the same amount could have been appropriated from the DSRA as per Sections 59 – 61 of the Contract Act. The Lenders have given conflicting Statement of Account. It is submitted that Adjudicating Authority has returned a finding of default only with regard to ECLGS-1 and on the date of default on 15.11.2022, only amount of Rs.52 lakhs was due in ECLGS-

1. There was no default of threshold amount, to enable the Adjudicating Authority to admit Section 7 Application.

7. It is submitted that Adjudicating Authority in paragraph-11 has held that the Applicant (Financial Creditor) has denied the existence of CMA and no CMA having been filed, the CMA is not proved, which finding is erroneous. The CMA was entered between Lenders and GSTAAD Hotels, which was given effect to by maintaining Expense Account and Retention Account and the amount being regularly transferred from retention amount by the Lenders for returning any finding of default on the loan account, the accounts maintained under the CMA were required to be looked into by the Adjudicating Authority. The observation of the Adjudicating Authority in paragraph 8 of the impugned order that existence of loan amount and Corporate Debtors' default on such loan amount, is undisputed fact, is without any basis. The Corporate Debtors never admitted any default. The Appellant has brought on record Report of the Statement of Accounts shared by Respondent, which indicate that there are corrections in certain parts in Statement of Accounts, shared by the Respondent on 06.05.2024 and those, which were brought before the Adjudicating Authority. The Statement of accounts indicate that Piramal never has added any default or penal interest, whereas Omkara has added penal interest in the amount.

8. It is submitted that both the Hotels run by the Corporate Debtors are profit earning Hotels, which are running Hotels and the action of Omkara to initiate CIRP is with an intent to take over the assets of the

CDs by transferring it to its favourites. The Adjudicating Authority did not consider that the CDs have enough cash reserves and was making sufficient profits and the Appellant has offered to pay back the amount. Present was not a case of admission under Section 7 against the Corporate Debtors. The object of IBC is to revive and ensure that Corporate Debtor stand on its own feet. When the Hotels are running and earning profits, an Asset Reconstruction Company, who has taken the assignment of debt, cannot be allowed to initiate insolvency as recovery mechanism and to ensure that Corporate Debtor is stopped running as profitable Company. The judgment of the Hon'ble Supreme Court in ***M. Suresh Kumar Reddy v. Canara Bank & Ors., Civil Appeal No.7121 of 2022*** relied by Adjudicating Authority is not attracted in the facts of the present case. The order of learned Single Judge dated 28.02.2024, dismissing the Writ Petition filed by M/s GSTAAD Hotels has already been challenged before the High Court in Writ Appeal, which is pending consideration.

9. Shri Arun Kathpalia, learned Senior Counsel appearing for Respondent, refuting the submissions of the Appellant submits that validity of Assignment Agreement executed by Lenders in favour of Omkara dated 27.12.2022 has been challenged by M/s. GSTAAD Hotels in the Karnataka High Court, which Writ Petition has been dismissed on 28.02.2024, upholding the assignment, hence, the Appellant is not entitled to address any submission, questioning the assignment in favour of Omkara, which assignment has been upheld by the High Court. The

submission of the Appellant that on account of withdrawal of the earlier Section 7 Application filed by IDBI Trusteeship Ltd. on 13.12.2022 and 23.12.2022, Section 7 Application filed by Omkara is hit by principle of *res-judicata*, cannot be accepted. Section 7 Application filed against GSTAAD Hotels and Neo Capricorn is based on default, which was committed by CDs on 15.11.2022, whereas earlier Section 7 Application was filed by IDBI Trusteeship Ltd. on default, which was committed in April and May 2021. It is submitted that principle of *res-judicata* or issue of *estoppel* has no applicability in Section 7 Application filed by Omkara.

10. With regard to ECLGS-1 and ECLGS-2, it is submitted that as per sanctions on 30.12.2020 and 11.03.2022, the Corporate Debtors were liable to make payment towards interest. The Corporate Debtors having committed default in repayment of the interest and principal as per ECLGS-1, as per repayment schedule, the default was committed by the Corporate Debtors. With regard to ECLGS-1, Corporate Debtor was to make a monthly principal repayment of Rs.2,04,16,667/- from 15.12.2021 till 15.11.2025. The monthly interest rate of 13% was to be paid under ECLGS-2 from April 2022 to April 2028. Default was committed by the Corporate Debtor with regard to ECLGS-1 and ECLGS-2 leading the Financial Creditor to issue a legal notice dated 15.02.2023, calling upon the Corporate Debtors to pay the outstanding amount of Rs.666,53,26,968/-. The Corporate Debtors failed to perform its obligation in accordance with the terms agreed and Statement of Account. The Statement of Account clearly indicates that on 15.11.2022 there was

a clear default on the part of Corporate Debtor in making the due payment. On the date of legal notice there was default of more than Rs.1 crore. It is settled law that once Adjudicating Authority is satisfied regarding existence of debt and default to the extent of Rs.1 crore, the Adjudicating Authority has to admit Section 7 Application. Default, which was the basis of filing of first Section 7 Application, the date of default was different.

11. With regard to DSRA as contended by learned Counsel for the Appellant in this Appeal, no such argument was made before the Adjudicating Authority, nor any such pleading was raised by the Appellant before the Adjudicating Authority. The argument based on DSRA has been raised in this Appeal for the first time. In any view of the matter, there is no provision of DSRA in ECLGS-1 and ECLGS-2 Facilities. DSRA provisions only existed qua the Loan Agreement dated 26.12.2017. Thus, DSRA has no bearing on ECLGS-1 and ECLGS-2. No proof has been shown by the Appellant that there existed any balance out of the undisbursed DSRA and there was any replenishment made by the Borrower. At the time of assignment of present facilities to Omkara, there existed no amount in the undisbursed DSRA. The same was already adjusted and utilized as repayment of the unpaid tranches by the Appellant. The Corporate Debtor has not even able to service interest component payable under the ECLGS-1 and ECLGGS-2. The 15% penal interest, which is charged by Respondent No.1, is owing to default interest

and both penal interest and default interest have been used interchangeably.

12. As regards, the submission of the Appellant regarding servicing of debt from CMA, the CMA was entered on 17.01.2018, as per which 66% of daily gross revenue to be transferred to designated account titled as Expense Account and the remaining 34% to be transferred to a designated account titled as Retention Account, which would be utilized by Lenders towards servicing of the loan advanced to the Corporate Debtors. Despite Corporate Debtors servicing 34% of the collections towards the loan, still default was committed. The CMA only provided for a mechanism to appropriate a percentage of the revenue towards servicing of the debt. As per Clause 18.39 of the Loan Agreement, the Corporate Debtor had agreed and undertook that in the event the funds lying in the Retention Account are not sufficient for repaying the loan or any part thereof, the Corporate Debtor shall ensure that the loan and every part thereof is repaid through such other funds as may be necessary for this purpose and acceptable to Lenders. Hence, when 34% of the collections fell short of repayment of facility, it fell upon the Corporate Debtor to make good the "default". The finding of the NCLT that there is debt and default is based on materials on record. There being default of more than Rs.1 crore, no exception can be taken to the admission of CIRP Against the Corporate Debtor. There existed the clear debt and default under the terms of Loan Agreement under ECLGS-1 and ECLGS-2. Both the Appeal(s) filed by the Appellant deserve to be dismissed.

13. We have considered the submission of learned Counsel for the parties and have perused the record.

14. From the submissions of learned Counsel for the parties and the materials placed on record, following issues fell for consideration in these Appeal(s):

(1) Whether Assignment dated 27.12.2022 made in favour of Omkara Assets Reconstruction Pvt. Ltd. by the Lenders was not in accordance with the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act") as well as the Circulars issued by the Reserve Bank of India, the account of Corporate Debtor having never declared as NPA or SMA?

(2) Whether due to dismissal of Section 7 Application filed on behalf of the Lenders, being CP(IB) No.1292/2021 and CP(IB) No.1287 of 2021 as withdrawn on 13.12.2022 and 22.12.2022, the Section 7 Application filed by Omkara Assets Reconstruction Pvt. Ltd. Being Company Petition (IB) 291 of 2023 and 290 of 2023 were not maintainable and were hit by principle of *res-judicata*?

(3) Whether the Corporate Debtors, who are running five star JW Marriott Hotel and Crown Plaza Hotel are profitable Companies earning substantial profits?

(4) Whether the Adjudicating Authority committed error in returning finding in paragraph 11 of the impugned order that

due to denial of existence of Cash Management Agreement, the arguments of the Corporate Debtor on the basis of servicing of debt as per Cash Management Agreement, cannot be accepted?

(5) Whether the Adjudicating Authority was obliged to consider the amount transferred to Lenders under Cash Management Agreement towards servicing of debt for returning a finding of default by the Corporate Debtor?

(6) Whether Lenders were obliged to maintain DSRA reserve as per Loan Agreement dated 26.12.2017, which amount was required to be appropriated towards payment of principal & interest due under Loan Agreement & ECLGS-I and ECLGS-II?

(7) Whether the finding of the Adjudicating Authority in paragraph 8 that it is undisputed fact that the defaults in payment of Loan amount exists, are sustainable the Corporate Debtor having disputed the default in the pleadings and arguments before the Adjudicating Authority?

(8) Whether out of amount sanctioned by Lenders under ECLGS-I and ECLGS-II of Rs.98 crores + Rs.65 crores = Rs.163 crores, the Lenders have used the amount of about Rs.140 crores to service its own debts and dues contrary to Agreement dated 30.12.2020 and 21.03.2022 and Adjudicating Authority rightly rejected the submission of

Corporate Debtor on ground of end use Certificate issued by Corporate Debtor.

(9) Whether Corporate Debtor has committed default towards ECLGS-1 sanctioned on 30.12.2020 as per date of default 15.11.2022?

(10) Whether the Financial Creditors have been able to prove default under the Loan Agreement dated 26.12.2017 and the ECLGS-II sanctioned on 21.03.2022?

(11) To what relief, if any, the Appellant(s) are entitled in these Appeal(s)?

Question No.(1)

15. The Assignment dated 27.12.2022 made by the Lenders in favour of Omkara was challenged by GSTAAD before the High Court of Karnataka at Bengaluru in Writ Petition No.6037 of 2023. The High Court vide its judgment and order dated 28.02.2024 has dismissed the Writ Petition. Copy of which order has been brought on record by the Appellant in its rejoinder affidavit. The challenge before the High Court of Karnataka of the Assignment by the Appellant was basically on the ground that accounts of CD having not been declared as NPA or SMA, the Lenders could not have assigned the debt in favour of Omkara. Violation of Circulars issued by Reserve Bank of India was relied before the High Court. The High Court by judgment dated 28.02.2024 held that assignment is not violative of Master Circular issued by the Reserve Bank of India. It was held that there is no statutory aberration and dispute

between private parties for enforcement of a private agreement would not get the audience of the High Court under Article 226 of the Constitution of India. The High Court in paragraphs 15 and 16 of the judgment laid down the following:

> "**15.** The underlying principle is that the assignment of asset to a new entity by the lender need not be on an express consent of the borrower. Knowledge to the borrower would be suffice and knowledge to the petitioner in the case at hand cannot be disputed. Therefore, the plea of assignment being contrary to the Master Circulars as is projected is untenable and all submissions shrouded with the plea of it being contrary to Master Circulars are all unsustainable. Assignment or re-assignment by private entities or in the business of banking is best left to bankers, borrowers and the lenders unless it runs contrary to any statutory provision either under the SARFAESI Act or Circulars issued by the Reserve Bank of India which are held to have statutory force. I do not find any statutory aberration in the case at hand qua Master Circulars issued by the Reserve Bank of India. If there is no statutory aberration, the plea would be reduced to a dispute between the petitioner, a private entity and respondents 4 to 6, a private entity and respondent No.7 another private entity. Disputes between private parties for enforcement of a private agreement would not get the audience of this Court under Article 226 of the Constitution of India. It is also submitted across the bar that the petitioner has projected these very submissions that are being projected before this Court in the proceedings instituted by the respondents before the NCLT invoking the Code. Therefore, it is for the NCLT to consider the plea of the petitioner. I do not find any warrant to interfere in the case at hand.
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> **16.** It would become germane to notice the judgment of a coordinate Bench in the case of ***M/S NITESH RESIDENCY HOTELS PRIVATE LIMITED v. UNION OF INDIA*** in answer to two submissions – one all the respondents not being a State under

Article 12 of the Constitution and other being the concept of Emergency Credit Loan Guarantee Scheme and banker's prerogative. The coordinate Bench has held as follows:

> "***E. AS TO EMERGENCY CREDIT LOAN GUARANTEE SCHEME AND BANKER'S PREROGATIVE:***
>
> *(i) The ECLG scheme promulgated by the Central Government which the petitioner's counsel heavily banked upon in support of his case, at its guideline 18 (xiv) imposes an obligation on the lender bank to secure its interest by taking all reasonable measures. The same reads:*
>
> > *"The payment of guarantee claim by the Trustee Company to the lending institution does not in any way take away the responsibility of the lending institution to recover the entire outstanding amount of the credit from the borrower. The lending institution shall exercise all the necessary precautions and maintain its recourse to the borrower for entire amount of credit facility owed by it and initiate all necessary actions for recovery of the outstanding amount, including such action as may be advised by the Trustee Company."*
>
> *When the lender Banks in given facts & circumstances of the case take a decision as dictated by the prudence, for abruptly recalling the credit facilities, it is not for the courts to sit in appeal over their wisdom. Writ Courts neither have means nor the expertise to re-evaluate the "prudential decisions" of the Banks that are made in the ordinary course of their commercial transactions with accumulated wisdom in the trade.*
>
> > *(ii) After all, the scope of judicial review of 'Bankers Decisions' is too restrictive, as observed by a Division Bench of this Court in MANNE GURUPRASAD vs. M/S.PAVAMAN ISPAT PVT. LTD10; paragraphs III (iii) & (iv) of the said decision read as under:*

"(iii) In matters between the Banker & borrower, a Writ Court has no much say except in two situations: where there is a statutory violation on the part of the Bank/financial institution, or where the Bank acts unfairly/unreasonably; Courts exercising constitutional jurisdiction u/A 226 do not sit as Appellate Authorities over the acts & deeds of the Bank and seek to correct them; even the doctrine of fairness/reasonableness does not convert the Writ Courts into appellate authorities over administrative decisions concerning the Banking business; unless the action of the Bank is apparently malafide, even a wrong decision taken by it cannot be interfered. (iv) It is not for the Court or a third party to substitute it's decision howsoever prudent or business like it may be, for the decision of the Bank; in commercial matters, the Courts do not risk their judgments for the judgments of the bodies to which that task is assigned; a Public Sector Bank or a Financial Institution cannot wait indefinitely to recover its dues; the fairness required of the Bank cannot be carried to the extent of disabling it from recovering what is due; in matters of loan transactions, fairness cannot be a one-way street; both the Bank & the borrower have to be equally fair to each other ..."

As observed by the co-ordinate Bench, banking business is better left to bankers. This Court would not sit as a supervisor to banking activities between the lender and the borrower except in cases where the dispute between the banker and the lender would touch upon violation of any statutory provision. No such violation though projected with all vehemence is found in the case at hand. Therefore, I decline to grant any of the prayers sought by the

petitioner noticed supra. It is for the petitioner to avail all such remedies as are available in law."

16. The prayer of the Appellant before the High court having not been accepted, questioning the assignment dated 27.12.2022, we are of the view that no fault can be found in the assignment at this stage. We, thus, proceed to examine the contention of the parties accepting the assignment dated 27.12.2022 in favour of the Financial Creditor.

Question No.(2)

17. The submission which has been pressed by the Appellant is that on account of withdrawal of earlier Section 7 Application filed by IDBI Trusteeship Ltd. on 13.12.2022 and 22.12.2022, present Application is barred by principles of *res-judicata*. The earlier Section 7 Applications being CP(IB)No.1292 of 2021 and CP(IB) No.1287 of 2021 were filed by IDBI Trusteeship Ltd. on behalf of the Lenders alleging default on 15.04.2021 and 15.05.2021. The default in the aforesaid proceedings was default of Loan Agreement dated 27.12.2017. Section 7 Application, which has given rise to present Appeal has been filed alleging default of ECLGS-1 and ECLGS-2. In the earlier Section 7 Application initiated by IDBI Trusteeship Ltd., the ECLGS Facilities were not subject of consideration, nor the Applications were founded on any default under ECLGS Facility. Hence, we are of the view that the Applications – CP(IB) No.291/MB/2023 and CP(IB)No.290/MB/2023, cannot be held to be barred by the principle of *res-judicata.* We, thus, do not find any

substance in the submission of the Appellant that proceedings under Section 7 initiated by Omkara is barred by principle of *res-judicata*.

18. Even though, we have found that Section 7 Application filed by Omkara is not barred by *res-judicata,* the issue still needs to be considered is as to whether Section 7 Application filed by Omkara was for resolution of insolvency of the Corporate Debtor or was only filed as recovery measure. Following are the facts, which need consideration while answering the above issue:

(i) Section 7 Application, which was filed by IDBI Trusteeship Ltd. on behalf of the Lenders was withdrawn on 13.12.2022 and 22.12.2022 and it is to be presumed that on the date when Application was withdrawn, there was no need for insolvency resolution process of the CD. It is to be noted that while withdrawing Section 7 Application, neither any reasons have been given for withdrawal, nor any liberty was given to file a fresh application.

(ii) Immediately after withdrawal of Section 7 Application, the debt was assigned by Lenders to Omkara on 27.12.2022, who issued recall notice on 15.02.2023 and filed Section 7 Application on 09.03.2023, claiming debt and default as on 15.11.2022, which date was prior to withdrawal of Section 7 Application.

19. The above fact raises question on the object and motive of Omkara to initiate CIRP against the CDs, which also needs consideration.

Question No.3

20. Learned Counsel for the Appellant has pleaded in this Appeal as well as in submission that the Hotels, which are being run by Corporate Debtors namely - JW Marriott (a five-star Hotel) and Crown Plaza Hotel are profitable Companies, earning substantial profits. It has been pleaded that after the loan transaction dated 26.12.2017 till March 2020, the Corporate Debtors have been servicing the loan without there being any default. It is further case of the Appellant that even after onslaught of Covid-19, which engulfed whole world, the Corporate Debtor was making repayment and from the year 2020-21 and thereafter has been able to make substantial repayment towards the Facilities taken from the Lenders. It is submitted that the Hotel business was the most affected business by Covid-19. Hotel business was great sufferer due to onslaught of Covid-19. Both Union of India and Reserve Bank of India has taken measures to extend financial support by means of ECLGS Scheme, which Scheme was floated for giving financial support to the Corporate Debtors to come out from the adverse effect of Covid-19. In the Company Appeal (AT) (Ins.) No.165 of 2024, the Appellant has pleaded about the current financial status of JW Marriott Hotel as well as Crown Plaza Hotel. In paragraph 7.12 of the Appeal, payments made by Borrower to the Lenders from April 2017 to 11.01.2024 has been tabulated. GSTAAD has made payment of Rs.418.06 crores during this period and Neo Capricorn has made payment of Rs.78.92 crores. Paragraph 7.12 of the Appeal is as follows:

"7.12 The Borrowers have repaid sums to the Lenders in the following manner:

GSTAAD HOTELS PRIVATE LTD.

Sl.No.	Financial Year	Amount in INR (Crores)
1.	April 2017-March 2018	10.28
2.	April 2018-March 2019	54.33
3.	April 2019-March 2020	60.27
4.	April 2020-March 2021	55.73
5.	April 2021-March 2022	78.34
6.	April 2022 – March 2023	96.19
7.	April 2023 – 11th January 2024	42.04 to Piramal and 20.89 towards the Respondent
8.	**TOTAL**	**418.06**

NEO CAPRICORN PLAZA PRIVATE LTD.

Sl.No.	Financial Year	Amount in INR (Crores)
1.	April 2017-March 2018	2.12
2.	April 2018-March 2019	10.10
3.	April 2019-March 2020	12.27
4.	April 2020-March 2021	11.43
5.	April 2021-March 2022	16.60
6.	April 2022 – March 2023	17.06
7.	April 2023 – 11th January 2024	6.54 to Piramal and 2.81 towards the Respondent
8.	**TOTAL**	**78.92**"

21. The above table fully support the submissions of the Appellant that Corporate Debtors have been earning revenue and making payments to the Lenders during Covid-19 period as well as the period thereafter. Further, in paragraph 7.13, it has been pleaded that between April 2022 to 11.01.2024, a sum of Rs.138.23 crores have been paid to Lenders. Paragraph 7.13 is as follows:

> "7.13 By the CMA, and notwithstanding the purported Assignment of the Loan Documents on 27.12.2022 as per Exhibit U to the Application, by the Lenders, the Corporate Debtor has continued to pay the Lenders between April 2022 to 11th January 2024, a sum of INR 138.23 Crores to the Lender and a sum of INR 20.89 Crores to the Respondent as stated *supra*."

22. The reply has been filed by the Financial Creditor in Company Appeal (AT) (Ins.) No.165 of 2024. The contents of paragraphs 7.12 to 7.14 of the Appeal have been replied by Financial Creditor in paragraph 11 of the reply. The payments as pleaded in paragraphs 7.12 and 7.13 has not been denied. However, in paragraph 10, a plea was taken by the Financial Creditor that any shortfall or insufficiency in the repayment has to be shoulder by the Corporate Debtors and repayments were not sufficient to discharge the liabilities towards Lenders.

23. Be that as it may, the above facts clearly support the submission that both the Hotels were running Hotels and earning revenue and payments were made to the Lenders even during Covid-19 period and thereafter. The Lenders, who have given finances to the Corporate Debtor for a Project, are also obliged to support the Corporate Debtor in running

the business and extend their helping hand to the Corporate Debtor. The object of IBC is insolvency resolution. We, thus, find substance in the submissions of the Appellant that JW Marriott Hotel and Crown Plaza Hotel, which are run by the Corporate Debtors were profitable Companies, earning substantial profits.

Question Nos.(4) & (5)

24. The Appellant has placed reliance on Cash Management Agreement entered between the parties on 17.01.2018 in pursuance of the Loan Agreement dated 26.12.2017. The Appellants' case before the Adjudicating Authority as well as before this Tribunal is that as per the CMA dated 17.01.2018, the daily gross revenue was to be transferred from designated Revenue Account to Expense Account, 66% for Borrower for operating capital needs of the Hotel and 34% was to be transferred to designated account titled as Retention Account, on a daily basis, which would be used by the Lender towards servicing of loan financed to the Corporate Debtors. The relevant pleadings regarding CMA have been referred to in paragraph 7.10 of the Appeal. Paragraph 7.10 of the Appeal is as follows:

> "7.10 The Trustee on behalf of the Lender would transfer from the Revenue Account as per the CMA as follows--
>
> 7.10.1. 66% of the daily gross revenue from the Revenue Account to a designated account bearing number 002284000002912 at YES Bank and 57500000439879 at HDFC Bank titled as Expense Account' also on a daily basis, which would be

utilized by the Hotel Operator for working/operating capital needs of the Hotel, and:

7.10.2. 34% of the daily gross revenue from the Revenue Account to another designated account titled as '**Retention Account**' bearing number at 045881300000023 at YES Bank and 50200046058626 at HDFC Bank also on a daily basis, which would be utilized by the Lender towards servicing of the loan advanced to the Corporate Debtor.

7.10.3 That it was agreed between the Parties as per Clause 1 B (iv) of the CMA, that a reconciliation of accounts would be done on a monthly basis, whereby only the amounts equivalent to the Corporate Debtors profit share from the Hotel were utilized by the Lender to service its Loan.

7.10.4. Therefore, if upon the monthly reconciliation, an amount in excess of the Corporate Debtor's profit entitlement from a particular month had been transferred to the Retention Account, then in that event the Lender was obliged to transfer back the excess amount to the Expense Account within 10 days of being provided with the monthly reconciliation statement by the Hotel Operator, and any failure on the part of the Lender, would amount to a Cash Management Default under the CMA. Pursuant to such a default, as per Clause 2 of the CMA the Hotel Operator was no longer obliged to deposit the gross revenue collections into the Revenue Account and was instead empowered to deposit the same into the Expense account directly for meeting the working/operational capital expenses of the Hotel."

25. It was further pleaded that from the aforesaid arrangement, it is clear that CMA was not merely a Lender-Borrower Agreement, but it shows that Lender had keen interest in the working and profitability of the Hotel, which arrangement was drawn after careful negotiations between the parties. Before the Adjudicating Authority, a submission was made by the Corporate Debtor relying on the CMA, existence of which CMA was denied by the Omkara and the Adjudicating Authority in paragraph 11 of the impugned order has returned the following finding:

> "**11.** We find that the Applicant has denied the existence of Cash Management Agreement or any correspondence between the parties to substantiate the existence thereof. The Corporate Debtor has not placed on record any such agreement or document, accordingly this argument also does not have a force."

26. The CMA was contemplated in the Loan Agreement dated 26.12.2017. The CMA was defined in the Loan Agreement dated 26.12.2017 in the First Schedule of the Loan Agreement, dealing with definition and interpretation, the CMA has been defined as follows:

> "Cash Management Agreements" shall mean the agreement executed on or about the date hereof between GHPL, Marriott Hotels India Private Limited (as the operator), Global Hospitality Licensing S.A R.L. (as GHL), Renaissance. Services B.V. (as RSBV), Marriott International Licensing Company B.V. (as Marriott) and the Lender (as Financier) which sets out the cash management arrangement between the parties thereto in relation to the JW Marriott Hotel together with the non-disturbance agreement executed between the parties thereto."

27. The CMA was entered between the parties and the amounts were regularly transferred into Retention Account, which Retention Account was operated by the IDBI Trusteeship Ltd. on behalf of the Lenders. Denial of Omkara before the Adjudicating Authority was wholly incorrect and against the record. The CMA was a mechanism for repayment of financial Facilities advanced to the Corporate Debtor and that was a key agreement between the parties for repayment of the loan and without adverting to the CMA and its various clauses, no findings could have been returned by the Adjudicating Authority on default by the Corporate Debtor. In the reply, which has been filed in Company Appeal (AT) (Ins.) No.165 of 2024, Omkara has not denied the existence of CMA, rather it is pleaded that CMA is merely a repayment mechanism to ensure that portion of the revenue of JW Marriott Hotel be utilized to repay the debt. It is useful to extract paragraph 10 of the reply of the Financial Creditor, which is as follows:

> "10. Without contrary to the aforementioned submission it is submitted that the assignment of the CMA has no bearing on the fact that there was a default on the part of the Corporate Debtor and therefore the CIRP of the Corporate Debtor initiated by the Ld. NCLT, Mumbai is right in passing the Impugned Order as the ingredient stated in the Section 7 Code has been met with. It is submitted that as per Clause 18.39 of the Loan Agreement, Clause 17.39 of the ECLGS Loan Agreement 1 and ECLGS Loan Agreement 2, respectively, the CMA is merely a repayment mechanism to ensure that a portion of the revenue of the JW Marriott hotel would be utilized to repay the debt under the Loan Agreement, ECLGS Loan Agreement 1 and ECLGS Loan Agreement 2. In case the amounts in the retention account were insufficient to service the debts of the Corporate Debtor under the Loan Agreement, ECLGS

> Loan Agreement 1 and ECLGS Loan Agreement 2, the Corporate Debtor was required to ensure that shortfall/insufficiency is made up. Therefore, the amounts were payable irrespective of the amounts received under the mechanism of the CMA. Moreover, the said issue has been raised for the first time by way of the present appeal by the Appellants. The said contention was never raised nor submitted before the Ld. NCLT, Mumbai."

28. From the above, it is clear that CMA between the parties was one of the most relevant Agreement to regulate the debt repayment. The CMA also imposed certain obligations on the Lenders and for finding out default on the part of the CD, CMA and consequent repayment under the CMA was required to be examined by the Adjudicating Authority. The Adjudicating Authority simply on mere denial of Omkara to the existence of CMA has rejected the submission of the Appellant. The observation of the Adjudicating Authority that CD could not prove existence of CMA by any correspondence between the parties is also without any basis. The CMA was duly contemplated into a Loan Agreement and was actually executed between the parties.

29. The GSTAAD Hotels filed reply in CP(IB)No.291/MB/2023. In the reply filed by the CD, CMA was both pleaded as well as brought on record. It is useful to notice the pleadings in reply. In paragraph 9 of the reply, CMA dated 17.01.2018 was specifically pleaded. Paragraphs 9 and 10 of the reply are as follows:

> "9. That the Respondent, PCHFL and the Hotel Operator had a Cash Management Agreement dated 17.01.2018 ("CMA") whereby the entire gross revenue collections of the Hotel were to be deposited by the Hotel Operator into a designated bank account on

a daily basis, which was titled and styled as the Revenue Account. Thereafter, PCHFL would transfer:

(a) 66% of the doily gross revenue from the Revenue Account to another designated account titled as Expense Account also on a daily basis, which would be utilized by the Hotel Operator for working/operating capital needs of the Hotel, and;

(b) 34% of the daily gross revenue from the Revenue Account to another designated account titled as Retention Account also on a daily basis, which would be utilized by PCHFL towards servicing of the loan advanced to the Respondent.

10. It was agreed between the Parties, that a reconciliation of accounts would be done on a monthly basis, so as to ascertain that only the amounts equivalent to the Respondent's profit shore from the Hotel were utilized by the PCHFL for servicing its loan. That is to soy, if upon the monthly reconciliation, an amount in excess of the Respondent's profit entitlement from a particular month had been transferred to the Retention Account, then in that event PCHFL was obliged to transfer back the excess amount to the Expense Account within 10 days of being provided with the monthly reconciliation statement by the Hotel Operator, and any failure on the part of PCHFL to do so would amount to a Cash Management Default under the CMA. Pursuant to such a default, the Hotel Operator was no longer obliged to deposit the gross revenue collections into the Revenue Account and was instead empowered to deposit the same into the Expense Account directly for the purpose of meeting the working/operational capital expenses of the Hotel. A Copy of the CMA is annexed hereto as

30. In paragraph 10 of the reply, the CD has stated to annexed the copy of CMA as Exhibit R-3. The Adjudicating Authority in the impugned order has observed that "*The Corporate Debtor has not placed on record any such agreement or document, accordingly this argument also does not have*

a force". The above observation of the Adjudicating Authority can be said to be reckless observation without adverting to the reply and documents filed along with the reply. The CMA was brought on record as Exhibit R-3. We, thus, are of the clear opinion that the above finding has been returned by the Adjudicating Authority without even adverting to the pleadings of the CD and the materials brought on the record by the CD. The findings, thus, in paragraph 11 of the impugned order are wholly unsustainable.

31. We may refer to the relevant Clauses of the CMA, where after careful consideration and negotiation between the parties, the mode and manner of repayment of loan has been thought over and agreed. Clause-1, A, B, F, G and H are as follows:

> "**1. <u>CASH MANAGEMENT ARRANGEMENT</u>**
>
> A. The Parties agree that the operating profit which (after deduction of the amounts payable to Marriott Companies under the Marriott Agreements) would otherwise be distributed to Owner (as set out in the interim accounting referred to in section 5.02 of the Operating Agreement) ("Owner Profit") will be deposited in the Retention Account (as defined below) for Financier to repay the loan under the Facility Agreement
>
> B. To implement t11o arrangement In Section LA above, the parties agree that, notwithstanding section 9.03 of the Operating Agreement, until there is a Cash Management Default, the Hotel's Gross Revenues in relation to each Accounting Period shall be deposited and utilized in the following manner:
>
> (i) Operator will deposit all Hotel's Gross Revenues (Including tax or similar charges collected by the Hotel from patrons or guests, "Taxes") on a daily basis into an

account established by Owner with Financier as revenue account

(ii) On a daily basis, through an automatic transfer via standing instruction:

(a) Financier will transfer 66% of the Gross Revenues (including Taxes) from the Revenue Account into a designated account at YES Bank (Account number: 02284000002912) which will be an expense account ("Expense Account"). Operator will use the funds in the Expense Account to pay for the operating expenses of tile Hotel and Taxes; and

(b) Financier will transfer the remaining amount of the 34% of the Gross Revenue in the Revenue Account (after transfer of the amount referred to in section 1.B(ii)(a) above) into an account established by Owner with Financier as retention account ("Retention Account"). Financier will use the funds in the Retention Account to service the debt under the Facility Agreement.

(iii) On a weekly basis, Operator will deposit the Taxes (which are accrued during the week and after adjustment of input tax credit) Into a designated account (a HDFC bank account) ("Statutory Account") which will be paid to there relevant authorities

(iv) within Seven Business Days after the end of each Accounting Period, Operator will provide a copy of the interim accounting referred to in section 5.02 of the Operating Agreement to Owner and Financier and a monthly reconciliation will be performed to ensure that only amount constituting Owner's Profit (including contribution to the Repairs and Equipment Reserve) is deposited and/ or retained in the Retention Account for

repayment of the loan under the Facility Agreement. Accordingly,

(a) if: (I) the aggregate amounts which have been transferred from the Account to the Retention Account pursuant to section 1 B(ii)(b) above in the immediately preceding Accounting Period; exceed (2) the Owner Profit (including contribution to the Repairs and Equipment Reserve) relating to the immediately preceding Accounting Period, Financier and Owner will deposit- the excess amount into the Expense Account within ten, Business Days after Operator's provision of the interim accounting to Owner and Financier; and

(b) If:(1) Owner's Profit (including contribution to the Repairs and Equipment Reserve) in relation to the immediately preceding Accounting Period; exceeds (2) the aggregate amounts which have been transferred from the Revenue Account to the Retention Account pursuant to section l.B(ii)(b) above in the immediately preceding Accounting Period, Operator will deposit the excess amount into the Retention Account within ten Business Days after Operator's provision of the interim accounting to Owner and Financier;

F. Owner will ensure Financier to comply with the terms of Section I of this Agreement. Any breach by Owner or Financier of Section J of this Agreement that Owner or Financier fails to rectify within 10 days after receiving a written notice from Operator requesting for rectification will constitute a "Cash Management Default".

G. This Agreement does not relieve Owner's obligation to advance additional funds required to maintain Wo1·king Capital and Inventories at levels determined by Operator to be necessary to satisfy the needs of the Hotel as Its operation may from time to

time require pursuant to section 7.01 of the Operating Agreement. Ow net' wit\ provide such funds to the Expense Account upon Operator's request.

H. The current split of 66% /34% ratio to allocate Hotel Gross Revenue into the Expense Account and Retention Account on a daily basis pursuant to Section l.A(ii) is determined:

(i) On the basis that the amount of Taxes collected by the Hotel will on average constitute approximately 23.5% of the Gross Revenue collected by the Hotel. If the relevant percentage of Taxes increases (e.g. due to a change in tax laws or regulations), the split ratio will be adjusted to increase the percentage of Gross Revenue to be deposited in the Expense Account on a daily basis; and

(ii) Based on the percentage of Owner Profit (including contribution to the Rep[airs and Equipment Reserve) to Gross Revenue in the budget of the Hotel for year 2018. If there is significant change of such percentage in the future budget which may result in the daily allocation to the Expense Account becoming insufficient for the operation of the Hotel, Financier and Operator will adjust the daily split ratio in writing to ensure there is sufficient funds for the operation of the Hotel at the Expense Account."

Notwithstanding any changes to the daily split ratio as described in this Section 1.H above, the monthly adjustment pursuant to Section 1B(iv) will remain unchanged."

32. The above Clauses, thus, clearly provide mechanism for repayment to the Lender.

33. It is relevant to notice that in Section 7 Application, which was filed by the Omkara, neither in 'List of Dates' nor in Part-IV the Omkara has

mentioned about the CMA dated 17.01.2018, whereas all other events and instances after Loan Agreement has been captured in the 'List of Dates' and Part-IV, but reference to CMA was conspicuously absent in the pleadings of Omkara. As noted above, in the reply, which has been filed in the Appeal by Omkara, having accepted the CMA, the findings recorded by Adjudicating Authority in paragraph-11 becomes untenable and unsustainable. The existence of CMA and transfer of the amount in the Retention Account, which was followed after execution of CMA was required to be noticed by the Adjudicating Authority before returning a finding of default. We, thus, are of the view that findings returned by the Adjudicating Authority in paragraph-11, are untenable. We are of the view that the Adjudicating Authority is required to consider Section 7 Application afresh, after taking into consideration various clauses of the CMA and consequently remittance of the amount towards repayment of the loan in the Retention Account.

34. In view of the above, we answer Question Nos. (4) and (5) in following manner:

Ans. to Question No.(4) :	The Adjudicating Authority committed error while holding in paragraph-11 that due to denial of existence of Cash Management Agreement, the submission of the Appellant on the basis of Cash Management Agreement,

cannot be accepted.

Ans. to Question No.(5) : The Adjudicating Authority was obliged to consider the amounts transferred to Lenders under the Cash Management Agreement towards servicing of debt for returning the finding of default by the Corporate Debtor.

Question No.(6)

35. Learned Counsel for the Appellant has made emphasis on Debt Service Reserve Amount ("DSRA"), which was contemplated in the Loan Agreement dated 26.12.2017. It is contended that Lenders were obliged to maintain a DSRA as per Loan Agreement and which DSRA was to be utilized for payment of principal and interest and any shortfall in the DRSA was to be replenished by CD. The copy of the Loan Agreement has been brought on record by the Appellant as part of Annexure-2. Clause 9 of the Agreement dated 26.12.2017, dealt with 'Debt Service Reserve Amount'. Clause 9 of the Agreement is as follows:

> "**9. DEBT SERVICE RESERVE AMOUNT**
>
> 9.1 The Borrowers agree that the Lender shall reserve the Minimum DSRA Balance as an undisbursed amount under the Loan, which shall be a reserve ("**DSRA"**)
>
> 9.2 The DSRA shall be maintained and operated in accordance with this Agreement and the other Finance Documents. Any shortfall in interest payments will forthwith be fulfilled from the DSRA.

9.3 In the event that any amount has been utilised out of the DSRA, the same shall be deemed to be a Disbursement under the Loan and the Borrowers shall, within 7 (seven) days of such Disbursement Date, deposit such amounts of money into the Retention Account such that the undisbursed portion of the DSRA together with such monies deposited into the Escrow Accounts aggregate the Minimum DSRA Balance. In the event the DSRA is disbursed to service any Interest/ Principal Repayment, then the same will have to be replenished by the Borrowers within 7 (seven) days and then the amount shall be maintained in an fixed deposit with an exclusive lien marked in favour of the Lender/ Security Trustee."

36. Learned Counsel for the Appellant submits that amount of Rs.8 crores was undisbursed by the Lenders, which was the minimum DSRA balance. Learned Counsel for the Financial Creditor refuting the submission, submits that no contention was raised by the Appellant relying on the DSRA and no DSRA was ever maintained by the Lender. It is submitted DSRA amount having not been maintained, there is no question of utilizing DSRA towards payment of any interest or principal.

37. When we look into Clause 9 of the Loan Agreement, Clause 9 provides "*Lender shall reserve the Minimum DSRA Balance as an undisbursed amount under the Loan*". The aforesaid was an obligation of Lender to maintain the minimum DSRA balance, which was to be utilized for any shortfall in interest/ principal payment. The Appellant's case is that amount of Rs.8 crores was undisbursed. The mere fact that no submission was advanced by the CD before the Adjudicating Authority on DSRA, cannot be a ground to preclude the Appellant to raise the

submission in this Appeal. The DSRA was contemplated to be utilized for shortfall in any repayment and maintenance of debt service reserve and it was the obligation of the Lender. Hence, it is not open for the Lender to say that they had no obligation to maintain any DSRA and the submission advanced on behalf of the Appellant on DSRA has to be rejected. We are not persuaded to accept the submission of learned Counsel for the Respondent with regard to DSRA. The submission of the Appellant as noted above is that amount of Rs.8 crores was undisbursed and was kept as reserved amount, which was to be utilized for shortfall in any repayment of interest/ principal. We are of the view that said aspect of the matter was also needs to be looked into by the Adjudicating Authority before returning any finding of default.

38. The provision of DSRA is clearly reflected from the Loan Agreement dated 26.12.2017 itself. Further, the Loan Agreement itself provides that there will be DSRA of Rs.8 crores for CD – GSTAAD Hotel Pvt. Ltd. and Rs.2 crores for Neo Capricorn Plaza Pvt. Ltd. We may refer to 11th Schedule of the Agreement dated 26.12.2017, which contains purpose for the loan. The 11th Schedule, Clauses 1 and 2 of the Agreement are as follows:

"**ELEVENTH SCHEDULE**
(PURPOSE)

1. The GHPL Loan shall be utilized for the following purpose:
   (i) Up to Rs. 365,00,00,000 (Rupees Three Hundred and Sixty Five Crores) for the repayment of GHPL Existing Dues;

(ii) Upto Rs. 77,00,00,000 (Rupees Seventy Seven Crores) towards top up against receivables of the JW Marriott Hotel; and

(iii) The balance amount of Rs. 8,00,00,000 (Rupees Eight Crores) towards undisbursed DSRA.

2. The NCPPL Loan shall be utilized for the following purpose:

(i) Up to Rs. 98,00,00,000 (Rupees Ninety Bight Crores) for the repayment of NOPPL Existing Dues; and

(ii) The balance amount of Rs. 2,00,00,000 (Rupees Two Crores) towards undisbursed DSRA.

39. The above clearly indicate that out of the amount sanctioned, Rs.8 crores was towards undisbursed for GSTAAD Hotels and Rs.2 crores for Neo Capricorn. We do not find any substance in the submission of the Respondent that no DSRA was provided for by the Lenders. The submission made by the Respondent that there was no DSRA is to be rejected in face of the clear stipulation in the Loan Agreement itself and the Clauses 1 and 2 of 11th Schedule as extracted above. Even if, no submission was raised before the Adjudicating Authority on the basis of DSRA as is contended by the learned Counsel for the Respondent, DSRA is relevant for taking care of the shortfall and the Adjudicating Authority was required to consider the amount in DSRA to return any finding of default by the CD.

40. We, thus, answer Question No.(6) in following manner:

> The Lenders were obliged to maintain Debt Service Reserve ("DSRA") amount as per the Loan Agreement dated 26.12.2017, which amount was required to be appropriated

towards payment of principal and interest due under the Loan Agreement.

Question No.(7)

41. The Appellant has challenged the findings returned by Adjudicating Authority in paragraph 8 "*that it is undisputed fact that the Loan amount exists and there are defaults in payment*". The Adjudicating Authority in paragraph 8 has returned following findings:

> "**8.** We find that it is undisputed fact that the Loan amount exists and there are defaults in payment thereof. The Ld. Counsel for Corporate Debtor argued that no default has actually taken place and the present application is another attempt to initiate CIRP on same set of facts, which ought not be permitted by this Tribunal."

42. Although, it is undisputed that loan amount exists, but the finding that there is default in payment has been challenged by the Counsel for the Appellant. It is useful to notice that in the very next sentence, the Adjudicating Authority has observed "*The Ld. Counsel for the Corporate Debtor argued that no default has actually taken place*". When the Corporate Debtor has submitted before the Adjudicating Authority that no default has actually taken place, the observation of the Adjudicating Authority that it is undisputed that there are defaults in payment thereof, cannot be sustained. In the Appeal, the Appellant has made various submissions challenging the finding of default and it is submitted by the Appellant that no default was committed by the Appellant towards Loan Agreement and ECLGS-1 and ECLGS-2.

43. We, thus, answer Question No.(7) in following manner:

> The observation of Adjudicating Authority in paragraph 8, "*that it is undisputed fact that the Loan amount exists and there are defaults in payment thereof*" are unsustainable. The Corporate Debtor had disputed the default before the Adjudicating Authority itself. Thus, it cannot be accepted that default by the CD is undisputed fact.

Question No.(8)

44. The submission which has been pressed by learned Counsel for the Appellant before this Tribunal is that under ECLGS-1, amount of Rs.98 crores was sanctioned and under ECLGS-2, amount of Rs.65 crores was sanctioned, totaling to Rs.163 crores. The Appellant's submission is that out of the above Rs.163 crores, the Lenders have utilized about Rs.140 crores towards servicing of its debts and dues, which is contrary to the Agreement dated 30.12.2020 under which ECLGS-1 was sanctioned. The above submission was also advanced before the Adjudicating Authority, questioning the utilization of Rs.140 crores from the ECLGS Facilities granted to the CD for servicing the loan account of the Lenders. In paragraph 7.17 of the Appeal, following has been pleaded by the Appellant:

> "**7.17** Out of the sums advanced under the ECLGS scheme i.e., an amount of INR 163,00,00,000/-, the Lenders used the same to an extent of INR 1,39,89,91,301/- to evergreen the loan. On many occasions it was on the same day of disbursal as per Exhibit R – 15 and

the Bank Statements produced at Exhibit 2 to the Sur-Rejoinder filed by the Corporate Debtor."

45. The above submission was also raised before the Adjudicating Authority, which was repelled by Adjudicating Authority by returning a finding in paragraph 12, which is as follows:

> "**12.** As regards allegation that the ECLGS credit proceeds were used towards servicing of interest outstanding on the Loan Account, we find that the Corporate Debtor had furnished an end use Certificate stating that the proceeds were utilized towards working capital expenses. Nonetheless, the allegation of the Corporate Debtor, itself, confirms the fact that it was under financial distress that it was not able to service its interest obligations arising on Loan facility and that the proceeds of ECLGS credit came to be appropriated towards that. This is sufficient ground to conclude that there existed a default in payment of debt."

46. The ECLGS Facilities were extended to the Corporate Debtor for the purpose of working capital requirement. The Loan Agreement dated 30.12.2020 is brought on the record along with the rejoinder affidavit of the Appellant. In Clause-B, following has been pleaded:

> "B. The Borrower is in need of funds *inter-alia* for the purpose of working capital requirements. In this regard the Borrower has requested the Lender to extend financial assistance aggregating up to Rs.98,00,00,000 Crore (Rupees Ninety-Eight Crores). The Borrower proposes to appoint a security trustee in respect of the security created/ proposed to be created for the purpose of securing the Loan herein."

47. Clause 2.2 of the Agreement provides "Purpose" for which ECLGS Facility was extended. Clause 2.2 is as follows:

> "**2.** Purpose
>
> The Loan shall be utilized only for the purpose set out in Eleventh Schedule and for no other purpose. It is agreed between the parties that the Lender will be entitled to, from time to time, stipulate any additional terms, conditions or end-use/ purpose compliances. The Lender will also have a right to require the Borrower and the Obligors to comply with such conditions precedent and conditions subsequent in addition to the conditions stipulated in the Third Schedule and Fourth-Schedule hereunder."

48. Schedule 11 of the Agreement dated 30.12.2020 provides as follows:

> "**ELEVENTH SCHEDULE**
> **(PURPOSE)**
>
> The GHPL Loan shall be utilized for working capital requirements of the Project."

49. Thus, the amount, which was given under ECLGS Facility was towards the working capital. The Appellant has pleaded that the said amount was utilized by the Lender for meeting their loan. When the Financial Creditor is alleging default of ECLGS-1 and ECLGS-2, the above submission made by the Appellant becomes necessary to be considered to find out as to whether in essence there was any default committed by the CD in repayment. The Adjudicating Authority has relied on the end use Certificate, which was required to be furnished by the Corporate Debtor,

as per the Agreement dated 30.12.2020. It is true that end use Certificate was submitted by the CD as per the Agreement. The Appellant has referred to the Bank statements to show that amounts after receipt of the loan under the ECLGS Facility, was directly transferred from Retention Account to the Loan Account on the same day. Even though no end use Certificate was given by the CD, but when categorical submission before the Adjudicating Authority was raised that amount out of Rs.163 crores, which has been received by the CD under ECLGS-1 and ECLGS-2 and amount of about Rs.140 crores have been utilized for servicing the debt by the Lenders, the question was required to be considered by the Adjudicating Authority and merely on the point of end use Certificate, the said argument was not required to be rejected.

50. The Corporate Debtors are running two Hotels and to initiate insolvency, it has to be found out as to whether there was any default committed by the Corporate Debtors or default was on the part of Lenders themselves in not fulfilling the obligation, which was fastened on the Lenders under the Loan Agreement. We, thus, also do not approve the findings returned by the Adjudicating Authority in paragraph 12 of the order, rejecting the submission of the Appellant that ECLGS credit proceeds were used towards servicing of interest outstanding on the Loan Account. We answer Question No.(8) in following manner:

> The amounts sanctioned by Lenders under ECLGS-1 and ECLGS-2 of Rs.98 crores and Rs.65 crores, whether the said amount was used by the Lenders for servicing its own debts

or dues, contrary to the Agreement dated 30.12.2020 and 21.03.2022, was required to be considered by the Adjudicating Authority and the said argument raised on behalf of the CD, could not have been brushed aside on the ground that end use Certificate was given by the CD.

Question No.(9)

51. As noted above, the finding has been returned by the Adjudicating Authority regarding default under ECLGS-1 of Rs.98 crores sanctioned on 30.12.2020. As per the above Facility, the principal amount was payable within four years. There was moratorium of one year and interest amount was to be paid from the date it became due. The pleadings in Section 7 Application was that CD defaulted in ECLGS Facility in November 15, 2022. In Section 7 Application, the Financial Creditor has brought on record the Statement of Account from 20.12.2022 to 27.02.2023 pertaining to ECLGS Facility of Rs.98 crores. From the Statement of Account, which is filed, it is clear that the interest was due on 05.10.2022 and repayment of principal was due on 05.10.2022 have also been captured, including the repayment. The above Statement of Accounts reflects default as on 15.11.2022. The learned Counsel appearing for the Appellant refuting the allegation of default submits that there was more than one reason to not accept the submission of the Financial Creditor regarding default under ECLGS-1. In the reply, which was filed before the Adjudicating Authority, the CD has categorically pleaded in paragraph 17(vii) that after pandemic situation became better, the CD has made the

payment and excess payment was made as compared to the share of profit. It was pleaded that Piramal was obliged to refund the excess back to the Expense Account and hence, there was multiple breaches by the Lenders. The CMA has been alleged and it was pleaded that there was excess overdrawn amount of Rs.13.94 crores. It is useful to extract paragraph 17(vii) of the reply filed by the CD before the Adjudicating Authority, which is as follows:

> "**17(vii)** That when the pandemic situation became better and the various lockdowns were lifted, business of the Respondent gradually started picking up and the Hotel Operator continued to transfer the gross revenue collections into the Revenue account on a daily basis. Subsequently, Piramal transferred 66% to the Expense Account and 34% to the Retention account on a daily basis. Since the revenues had substantially reduced in the wake of the COVID 19 Pandemic, the Respondent's share of profit was less than the amounts transferred to the Retention Account. In view thereof, coupled with the provisions of the CMA, the Lender i.e., Piramal was obliged to refund the excess back to the Expense Account and was accordingly doing so, up until January 2021. Thereon, the Lender i.e., Piramal failed and neglected to do so, thus committing multiple breaches/ defaults of the Cash Management Agreement. Moreover, it has deprived the Respondent as well as the Hotel Operator of invaluable working capital and prevented them from discharging its financial obligations, payments to vendors and statutory authorities etc., aggregating to about 36.50 Crores. There is no gainsaying in the fact that as per the Cash Flow Statement [Reconciliation Statement] as of January 2023, there was an overdrawn amount of about INR 13.94 Crores, that Piramal is to release back into the Hotel Operator Account;

and the said situation continued as on date. A Copy of the Cash Flow Statement evidencing the same is appended hereto as Exhibit R - 6 and Exhibit R - 7."

52. A rejoinder affidavit was also filed by the Financial Creditor to the reply dated 09.07.2023 (limited rejoinder was filed). The rejoinder does not contain any reply to paragraph 7(vii) as extracted above.

53. In the present Appeal, an additional affidavit has been filed by the Appellant, in pursuance of liberty granted by this Tribunal by order dated 15.07.2024. Along with the additional affidavit, the Appellant has brought on record Review Report (Report on Forensic Audit) on commercial loan outstanding, where ECLGS Facility has also been noted. The Review Report submitted, indicate that there was due towards ECLGS upto November 15, 2022. However, the Report submits that the said amount could be set off against the excess payment made in Facility-1 and 2 and further there was un-utilized DSRA as on November 15, 2022 of Rs.3 Crores. It is useful to extract paragraph 5 of the Report, which states following:

"5. Analysis of Statement of loan Accounts prepared by Piramal:

The following table represents the interest and principal repaid during the loan tenure upto November 15, 2022. The table has been drawn summarizing the amounts reflected in the Piramal statement and based on the interest charged by Piramal.

(Amounts Rs.___ in Crores)

Transaction	**Particulars**	**Loan Accounts**	**Grand**

		Facility-1 and Facility-2	RCF – 50 Crores*	ECLGS	Total
Start Date					
Disbursements	Loan Disbursed	540.00	49.55	182.50	772.05
	Transfers	-	-	-	-
	Moratorium Interest *(Refer Note-1)*	27.48	2.76	-	30.24
	DSRA Disbursed *(Refer Note-2)*	7.00	-	-	-
	Amount Lent	**574.48**	**52.31**	**182.50**	**802.29**
Repaid	**Amount Repaid**	**309.12**	**26.06**	**43.72**	**378.89**
Interest	Interest Charged to accounts net of TDS (*Refer Note-3*)	271.79	26.3	20.70	318.72
	Payments towards interest (*Refer Note-4)*	271.79	26.06	20.27	318.72
	Due	-	0.17	0.43	0.60
	For the month of November	5.86	0.58	1.77	8.21
	Due for the month of November	-	0.17	0.43	0.60
	Overdue	-	-	-	-
Interest	Adjustment towards Principal *(Refer Note-4)*	37.33	-	23.45	60.87
	Principal Payable *(Refer Note-5)*	30.00	-	29.38	59.38
	Due/ (Excess Paid)	-7.33	-	5.93	-1.40
	For the month of November	-	-	2.45	2.45
	Overdue	-7.33	-	3.48	-3.85
	Total Overdue/ (Excess Paid)	-7.33	-	3.48	-3.85

Overdue/(Excess Payment)	Inter-loan adjustment in case of Excess paid	-	-	-	-
	Net Overdue/ (Excess Paid)	-7.33 -	- -	3.48 2.45	-3.85 2.45
	Overdue	-7.33	-	3.48	-3.85

Refer to Annexure-7 to this report for detailed loan account-wise bifurcation

Conclusion:

- From the above table, there has been an excess payment towards the loan account of Facility 1 and Facility 2 of Rs.7.33 Crores upto November 15, 2022, even though the interest charged by Piramal is in excess to normal practices as discussed earlier.
- The amount due towards ECLGS principal portion is Rs.3.48 Crores upto November 15, 2022, in our opinion, which could have been set off against the excess paid in Facility 1 and 2 and also from undisbursed DSRA of Rs.3 Crores.
- After setting off the excess paid towards due in ECLGS, the net excess paid to Piramal amounts to Rs.3.85 Crores.
- Unutilised DSRA as on November 15, 2022, is Rs.3 Crores.
- The statement of accounts furnished by Piramal vide email dated January 15, 2023, showed a write-off of loan balance amounting to Rs.132.75 Crores. However, the same has not been reckoned in the above table."

54. Although, this Tribunal on 15.07.2024 had granted time to Respondent to file reply to additional affidavit, but no reply is on record of Respondent No.2. Thus, we are of the view that for determining the default even for ECLGS Facility, the Adjudicating Authority has to consider all aspect of the matter, including excess payment under Facility-1 and Facility-2 and unused DSRA and only after considering all

relevant facts, findings regarding default of ECLGS could have been given. The findings of the Adjudicating Authority with regard to default under ECLGS-1 has been returned in paragraph-16 of the order. Except the observation "*Nonetheless the default in relation to the outstanding loan and ECLGS-I is clearly established*", neither there is any reason given, nor there is consideration of any material facts on the record for coming to the said finding. The finding returned by the Adjudicating Authority regarding default, thus is without considering of the materials on the record and are unsustainable. We have already held that DSRA was also required to be looked into, which has not even adverted to by the Adjudicating Authority. We, thus, are of the view that the Adjudicating Authority is required to consider the default of ECLGS and loan account, afresh, after considering the relevant materials on record, including the observations as made in this order.

Question No.10

55. Section 7 Application, which was filed by the Financial Creditors for initiating CIRP against the Corporate Debtor is part of the Appeal record. When we look into Part-IV, the specific pleadings have been made with regard to ECLGS-1 and ECLGS-2 and in Part-IV in paragraph 24, it has been pleaded that Corporate Debtor has defaulted in relation to ECLGS-1 on November 15, 2022. Paragraph 24 of Part-IV is as follows:

> "24. The Corporate Debtor defaulted in relation to the ECLGS Facility-! on November 15, 2022. This qualified as an Event of Default under clause 18 of the ECLGS Facility-1 Agreement."

56. Similarly, in paragraph 32, it was pleaded that Corporate Debtor has defaulted in relation ECLGS-2 on November 15, 2022. Paragraph 22 of Part-IV is as follows:

> "32. The Corporate Debtor defaulted in relation to the ECLGS Facility-2 on November 15, 2022. This qualified as an Event of Default under clause 18 of the ECLGS Facility-2 Agreement."

57. There are no specific pleadings with regard to default under the Loan Agreement dated 26.12.2017. However, in paragraph 34, it is pleaded that owing to the defaults committed by the Corporate Debtor under the Loan Agreement, ECLGS-I and ECLGS-2, the Financial Creditors issued a Recall Notice dated February 15, 2023. In Part-IV, Item No.2, "*Amount claimed to be in default and the date on which the default occurred*", the date of default is mentioned as 15.11.2022. Item No.2 of Part-IV is as follows:

"2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS DEFAULT OF IN TABULAR FORM)	As on 27'h February, 2023, the total amount claimed to be in default is Rs. 665,74,77,237/- (Rupees Six Hundred and Sixty-Five Crores Seventy-Four Lakhs Seventy-Seven Thousand Two Hundred and Thirty-Seven Only) which is due and payable. • Date of Default in respect of the Loan is November 15, 2022, the date on which the Corporate Debtor defaulted in payment of the outstanding amounts. • Date of Default in respect of the ECLGS Facility-1 is November 15,

		2022, on which date the Corporate Debtor defaulted m payment of interest and principal. • Date of Default in respect of the ECLGS Facility-2 is November 15, 2022, on which date the Corporate Debtor defaulted in payment of interest. The table showing the workings for computation of amount is annexed and marked as Exhibit "V"."

58. When we look into the findings, which has been returned by the Adjudicating Authority in paragraph 16 of the impugned order, where the Adjudicating Authority has held that the default in relation to the outstanding loan and ECLGS-1 is clearly established. Paragraph 16 of the order is as follows:

> "16. As regards default in repayment of ECLGS-2 is concerned we find that the repayment was to begin from 05.04.2024, however the interest was payable monthly after the first disbursement. Nonetheless the default in relation to the outstanding loan and ECLGS-1 is clearly established. Accordingly we do not find any merit in the contention that this application cannot be maintained as principal repayment under ECLGS-2 has not fallen due as yet."

59. The finding in paragraph 16, is thus, default regarding Loan under ECLGS-1 is clearly established. During submissions, learned Counsel for the Respondent has pressed on the default with regard to ECLGS-1 and ECLGS-2. We have already held that default under the Loan Agreement dated 26.12.2017 could not have been pronounced without considering

the CMA and amounts transferred by the Lenders to the Retention Account. The Adjudicating Authority having not examined and considered the CMA, no default with regard to Loan Agreement dated 26.12.2017 can be pronounced. Paragraph 16, itself indicates that with regard to ECLGS-2, repayment has to take place from 05.04.2024. In paragraph 16, the Adjudicating Authority has not returned any finding that there is a default with regard to ECLGS-2. Thus, the finding of the Adjudicating Authority is only with regard to ECLGS-1, which we have already dealt above. We, thus, are of the view the default with regard to ECLGS Facility could not have been pronounced by the Adjudicating Authority, without considering the CMA and amounts transmitted to Retention Account.

60. As noted above, in Part-IV, except statement that default is committed towards loan account, no details of default have been given and 15.11.2022 has been mentioned as the date of default. Nothing in respect of what was the outstanding amount under the Loan Agreement payable by the CD has been mentioned. We, thus, are of the view that Adjudicating Authority is required to consider the default under the loan account afresh. There being no finding of default regarding ECLGS-2 by the Adjudicating Authority, no further consideration is required with regard to ECLGS-2.

Question No.(11)

61. Now we come to the question of relief, to which the Appellant(s) are entitled in these Appeal(s).

62. We have already held that the findings of the Adjudicating Authority regarding denial of CMA are unsustainable. The Adjudicating Authority has also not adverted to the DSRA and to the submissions of the Appellant that amounts received under ECLGS-1 and ECLGS-2 have been used by the Lenders for servicing its debt and dues, contrary to the Agreement dated 30.12.2020 and 21.03.2022 was rejected without adverting to materials relied. The said question was also required to be considered by the Adjudicating Authority. We have also noticed above that both the Hotels are running Hotels and are earning revenues. In the written submissions, which has been filed by the Appellant in pursuance of liberty granted by this Tribunal, it has been stated that from 09.01.2024 till 27.11.2024 an amount of Rs.78 crores is available in the Retention Account of the CD, which has been converted as Fixed Deposits by the IRP. Thus, after admission of the CIRP, the amount was continued to be remitted to the Retention Account as per the Cash Management Agreement and as per submission of the Appellant, the amount of Rs.78 crores is available in the Retention Account. While entertaining the Appeal, we have passed the following interim order on 24.01.2024, which is as follows:

> " xxx xxx xxx
>
> In the meantime, in pursuance of the impugned order Committee of Creditors may not be constituted. However, the IRP shall ensure that there is no hindrance caused in running of the hotel by the operating management agency, with the assistance of the ex-

management and their employees who shall cooperate with the IRP.

xxx xxx xxx"

63. The IRP has also filed its written submissions, which mentions that Corporate Debtor is being run as a going concern and IRP has incurred operational costs during CIRP.

64. In view of the foregoing discussions and our conclusions, we dispose of both the Appeal(s) in following manner:

(1) Company Appeal (AT) (Ins.) No. 165 of 2024 is allowed. The impugned order dated 09.01.2024 passed in C.P.(IB) No.291/MB/2023 is set aside.

(2) C.P.(IB) No.291/MB/2023 is revived to be considered afresh after hearing the parties.

(3) Company Appeal (AT) (Ins.) No. 212 of 2024 is allowed. The impugned order dated 09.01.2024 passed in C.P.(IB) No.290/MB/2023 is set aside.

(4) C.P.(IB) No.290/MB/2023 is revived before the Adjudicating Authority to be heard and decided afresh after hearing the parties.

(5) The IRP may utilize the amount, which is kept in the Fixed Deposit by the IRP out of the Retention Account towards the payment of the CIRP costs and rest of the amount received after 09.01.2024 be remitted to the Financial Creditors towards their debts and dues.

65. We make it clear that while deciding these Appeal(s), we are not expressing any conclusive opinion on any of the issues, which are yet to be decided by the Adjudicating Authority consequent to this remand order. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

8th January, 2025

Ashwani