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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 20th May, 2021

+ **O.M.P.(I) (COMM.) 113/2021**

SHIPRA LEASING PRIVATE LIMITED Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. G. Tushar Rao, Senior Advocate with Mr. Manish Jha and Ms. Vishrutyi Sahni, Advocates for R-1.

+ **O.M.P.(I) (COMM.) 114/2021**

KADAM DEVELOPERS PRIVATE LIMITED Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Manish Jha and Ms. Vishrutyi Sahni, Advocates for R-1.

+ **O.M.P.(I) (COMM.) 115/2021**

SHIPRA HOTELS LIMITED

..... Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. Niraj Singh, Advocate for R-1.

+ **O.M.P.(I) (COMM.) 116/2021**

SHIPRA ESTATE LIMITED

..... Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra and Mr. Ankit Banati, Advocates.

+ **O.M.P.(I) (COMM.) 154/2021**

SHIPRA ESTATE LIMITED

..... Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra and Mr. Ankit Banati, Advocates.

+ **O.M.P.(I) (COMM.) 155/2021**

KADAM DEVELOPERS PRIVATE LIMITED Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Manish Jha and Ms. Vishrutyi Sahni, Advocates for R-1.

+ **O.M.P.(I) (COMM.) 156/2021**

SHIPRA LEASING PRIVATE LIMITED Petitioner

Through: Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates with Ms. Gauri Rishi, Ms. Pracheta Kar, Ms. Srishti Juneja, Mr. Sanampreet Singh and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents
Through: Mr. G. Tushar Rao, Senior Advocate
with Mr. Manish Jha and Ms.
Vishrutyi Sahni, Advocates for R-1.

+ **O.M.P.(I) (COMM.) 157/2021**

SHIPRA HOTELS LIMITED Petitioner
Through: Mr. Darpan Wadhwa and Mr. Vivek
Chib, Senior Advocates with Ms.
Gauri Rishi, Ms. Pracheta Kar, Ms.
Srishti Juneja, Mr. Sanampreet Singh
and Mr. Mohit Negi, Advocates.

versus

INDIABULLS HOUSING FINANCE LIMITED & ORS.

..... Respondents
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rishi Agrawala, Mr. Karan
Luthra and Mr. Ankit Banati,
Advocates.
Mr. Niraj Singh, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

I.A. 6276/2021 (u/S 151 of the CPC, 1908 for revival of the captioned petition) in O.M.P.(I) (COMM.) 113/2021

I.A. 6278/2021 (u/S 151 of the CPC, 1908 for revival of the captioned petition) in O.M.P.(I) (COMM.) 114/2021

I.A. 6274/2021 ((u/S 151 of the CPC, 1908 for revival of the captioned petition) in O.M.P.(I) (COMM.) 115/2021

I.A. 6268/2021 (u/S 151 of the CPC, 1908 for revival of the captioned petition) in O.M.P.(I) (COMM.) 116/2021

1. For the grounds and reasons stated therein, the applications are allowed and the abovementioned petitions are revived.
2. The applications are disposed of.

O.M.P. (I) (COMM.) 113-116/2021 & 154-157/2021

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3. The Shipra Group of companies – as the borrowers in a loan facility, faced with a recall notice, by way the present batch of petitions under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the ‘Act’*] seek restraining orders against the lender - Indiabulls Housing Finance Limited [*hereinafter referred to as ‘Indiabulls’*] from transferring/selling/alienating and creating any third-party rights or parting with the securities provided in the respective Loan Agreements entered into between the contracting parties.

Factual Matrix

4. A brief conspectus of the facts giving rise to the present petitions, is as follows:

THE PARTIES IN DISPUTE

4.1. Shipra Estate Limited [**‘SEL’**], Shipra Leasing Private Limited [**‘SLPL’**] and Shipra Hotels Limited [**‘SHL’**], [*hereinafter collectively referred to as the ‘Borrowers’*], and Kadam Developers Private Limited [**‘KDPL’**] are private companies belonging to the Shipra Group, which is in the business of development of real estate projects. [*KDPL and the Borrowers shall hereinafter be collectively referred to as the ‘Petitioners’*]. There are other parties to the petitions, but since they are arrayed as ‘Proforma Respondents’, mentioning them would not be of significance.

THE LOAN

4.2. Between 2017 to 2020, the Borrowers got sanctioned a loan facility of Rs. 2478 crores from Indiabulls for the purpose of development of real estate projects, by way of 16 sanction letters. Securities were created as provided in the sanction letters, and 16 loan agreements were executed between the parties. The present dispute concerns 14 out of the said loan agreements, through which a loan of Rs. 1686.10 crores has been disbursed by Indiabulls in favour of the Borrowers collectively.

THE COLLATERALS/SECURITIES

4.3. Clause 2.2 of the loan agreements envisaged that the Borrowers shall create various securities in favour of Indiabulls at the time of disbursement of the loan. The term ‘Security’ is defined in Clause 1.1 (xxix) of the loan agreements as under:

“Security” means, as the context may require, (a) a mortgage, charge, hypothecation, escrow, guarantee, pledge, lien and/or other security interest created and/or to be created in favour of the Lender securing the fulfilment of all the obligation(s) of the Obligor(s) (including payment of the Borrower’s Dues to the Lender) under the Loan Documents and/or (b) assets of the obligor(s) provided/to be provided as security/collateral, by way of, inter alia, a mortgage, charge, hypothecation, escrow, encumbrance, guarantee, pledge, lien and/or other security interest created, in favour of the Lender securing the fulfilment of all the obligation(s) of the Obligor(s) (including payment of the Borrower’s Dues to the Lender) under the Loan Documents and/or any other arrangement(s)/ agreement(s) having a similar effect.”

4.4. The securities, as stipulated in the loan agreements, include:

4.4.1. Security Cover – As per Clause 2.3 read with Entry 14 of Schedule I of the loan agreements, the Borrowers Companies were to ensure a ‘security cover’ by way of creation of charge

over properties mortgaged in favour of Indiabulls, such that the value of the mortgaged properties would at all times be sufficient to maintain two times the value of the combined dues of the Borrowers [*hereinafter referred to as the '2x security cover'*]. The mortgaged properties are listed below:

SNO.	PROPERTY	DATE	MORTGAGOR
1.	Plot admeasuring 73 acres in Sector 128, Noida, U.P.	25.01.2018	KDPL
2.	Plot No. 9 at Vaibhav Khand, Indirapuram, Ghaziabad, U.P.	08.02.2018	SHL
3.	Plot No. 10/3 at Vaibhav Khand, Indirapuram, Ghaziabad, U.P.	23.01.2018	SLPL
4.	Land at Dera Bassi		SEL
5.	Plot No. GH-1C, Sector 43, Noida, U.P.	28.02.2018	Verve Constructions LLP 'VCL'
6.	Plot No. GH-1B, Sector 43, Noida, U.P.	28.02.2018	Regalia Homes LLP 'RHL'

4.4.2. Pledge – Borrowers executed 22 Pledge Agreements, whereunder certain shares of the group companies were pledged towards Indiabulls (*being: 100% shares of KDPL, 25% shares of SEL, 100% of SLPL, and 100% of SHL, and 100% shares of Verve Homes Private Ltd. and 100% shares of Regalia Properties Pvt. Ltd.*).

4.4.3. Receivables/Escrow – All receivables from the projects at the mortgaged properties, including the entire sale proceeds,

advance, allotment money, rent, lease rentals, license fees, security deposits or any other receivables, were to be deposited in an escrow account which is entirely under the control of Indiabulls.

4.4.4. Post-dated and undated cheques – Issued by the Petitioners in favour of Indiabulls.

4.4.5. Guarantee – Personal / Corporate Guarantees were also provided by one Mr. Mohit Singh (one of the promoters), SHL, SLPL, Shipra Hotel and Bar Private Limited, and KDPL.

4.4.6. Hypothecation – In addition to the foregoing, hypothecation deeds were also executed between the Parties.

THE CONTROVERSY

4.5. Noida Authority, *vide* its letters dated 2nd and 4th September, 2020, issued to **RHL** and **VCL** respectively [*hereinafter collectively referred to as the ‘Mortgagors’*], revoked/cancelled their NoC/permission to mortgage dated 23rd February, 2018, in respect of Plots No. GH-1B & GH-1C respectively, situated at Sector 43, Noida, on account of failure of the Mortgagors to make payment of their overdues with respect to said plots, to the tune of Rs. 38 crores each (calculated at Rs. 219 crores each, as of 31st July, 2020).

CURE NOTICE

4.6. The above event caused Indiabulls to issue a Cure Notice dated 20th October, 2020, calling upon the Borrowers, Mortgagers and KDPL [*hereinafter collectively referred to as the ‘Shipra Group’*] to cure the impaired security (*being* property bearing No. GH-IC), or else provide an alternate security within 15 days from the receipt of the notice. No reply was received against the same from the Shipra Group or the Mortgagors and further, no steps were taken to regularize the impairment of securities.

RECALL OF LOANS

4.7. On 05th November, 2020 and 15th December, 2020, Indiabulls issued 14 Loan Recall Notices, recalling the entire outstanding loan and demanding repayment of Rs. 1763.61 crores within 7 days from receipt of the notice. However, no response was received from Shipra Group in respect to the said notice.

4.8. On 10th December, 2020, Indiabulls issued a notice under Section 95 of the Insolvency and Bankruptcy Code, 2016 [*hereinafter referred to as ‘IBC’*] to the personal guarantor of the loan agreements (one Mr. Mohit Singh, who is one of the promoters of Shipra Group), seeking repayment of outstanding dues within 14 days from receipt of the notice.

4.9. Then on 14th January, 2021, Indiabulls issued a reminder notice to the Shipra Group, conveying its intention of invoking the pledge of shares of the Petitioners under the Pledge Agreements. On the same date,

another loan recall notice was also issued by Indiabulls to the Shipra Group.

LEGAL PROCEEDINGS

- 4.10. The legality of the letters dated 2nd and 4th September, 2020 issued by Noida Authority revoking the permission to mortgage have been challenged by the Mortgagors before the Allahabad High Court.¹
- 4.11. Indiabulls' act of invoking personal guarantee against the Borrowers' loans was challenged in the Supreme Court, wherein it was directed *vide* order dated 22nd February, 2021 in W.P.C. 234 of 2021, that no coercive action may be taken against the guarantors.
- 4.12. Four petitions under Section 9 of the Act were filed before this Court by the Petitioners on 23rd March, 2021 [*being* O.M.P.(I.)(COMM) 113/2021 to 116/2021 *herein*] seeking restraining orders against Indiabulls from invoking the pledge agreements, disposing off or creating any third-party rights or otherwise parting with the shares pledged by the Borrowers, in relation to loans availed by them.
- 4.13. A *status quo* order was passed on 26th March, 2021 with respect to pledged shares. The said order and its subsequent orders were challenged by Indiabulls before the Division Bench of this Court,² wherein *vide* order dated 16th April, 2021, the status quo order was suspended on the ground that there are no reasons or *prima facie* findings in the order dated 26th March, 2021. The matter was remitted

¹ By way of W.P.(C.) No. 2686 of 2021 titled *Verve Constructions LLP versus State of UP and Ors.* and W.P.(C) No. 2737 of 2021 titled *Regalia Homes LLP versus State of UP and Ors.*

² By way of FAO(OS)(COMM) 59/2021, 60/2021, 61/2021 and 62/2021.

back to the Single Judge. While disposing of the petition, the Division Bench further observed, *inter alia*, that all documents relating to the invocation of the pledged shares shall be placed before the Single Judge. The Division Bench further observed that since the *lis* between the parties is pending before the Single Judge, the invocation of pledge would obviously be open to be challenged before the Single Judge.

- 4.14. On the same date, i.e. 16th April, 2021, Indiabulls issued a Notice of Sale, informing Shipra Group of its intent to sell the pledged shares of KDPL as per Clause 2.2(f)(ii) of the Loan Agreement(s). The shares were cumulatively valued at Rs. 840 crores. It was further stated that the shares will be sold after 12 p.m. on 19th April, 2021.
- 4.15. Meanwhile, post-dated cheques of the Petitioners, which had been kept as security, were presented by Indiabulls for payment, in lieu of amounts towards installment/EMI payable on 5th April 2021. The said cheques were dishonoured.
- 4.16. The Petitioners issued a notice invoking arbitration dated 14th April, 2021, requesting Indiabulls to suggest the name of an Arbitrator.
- 4.17. On 19th April, 2021, the Petitioners approached this court under Section 11 of the Act seeking appointment of a sole arbitrator to adjudicate the disputes between the parties. [*being* Arb. P. 513/2021 – 516/2021 *herein*].

- 4.18. On 20th April 2021, Indiabulls filed an affidavit before this Court disclosing that the shares of KDPL had been sold to DLF Home Developers Limited on 20th April, 2021 for Rs. 900 crores.
- 4.19. *Vide* Order dated 22nd April, 2021 passed in Arb. P. 516 of 2021, this Court appointed, Retd. Justice T. S. Thakur as the Sole Arbitrator, and directed that the pleadings under Section 9 be treated as an Application under Section 17 of the Act, to be decided by the Sole Arbitrator. This order was challenged by Indiabulls before the Supreme Court,³ wherein, by way of an order dated 06th May 2021, the Supreme Court set aside the order dated 22nd April, 2021, *inter alia* observing that the learned sole arbitrator was appointed without affording an opportunity to Indiabulls to file a reply to the petition under Section 11 of the Act. The matters were thus remitted to this Court for fresh consideration by hearing both the parties. The parties were allowed to seek interim reliefs before this Court. As an interim arrangement, the Supreme Court directed that till the time the present petitions are decided, Indiabulls would be bound by the statement made on 3rd May, 2021, before the learned Arbitrator in the application u/S 17 of the Act filed before him, by their Senior Counsel, Mr. Mukul Rohatgi to the effect:

“.....Mr. Rohatgi makes a statement at the bar that till the matters are disposed of by the Supreme Court and till the hearing of these Applications is resumed by this Tribunal, the Respondent shall not take any precipitate action in regard to the sale / transfer of the shares of Claimant Kadam Developers Pvt. Ltd. pledged with the Respondent.”

³ Civil Appeal No. 1763-1766/2021 arising out of Special Leave Petition (C) No. 6649, 6649, 6707, 6728 and 6762/2021.

- 4.20. In light of the leave granted by the Supreme Court, the Petitioners filed the second batch of petitions under Section 9 of the Act on 11th May 2021, [O.M.P.(I.)(COMM.) 154/2021 to 157/2021]. This time they have sought for a stay on the invocation of all securities provided under the Loan Agreements to Indiabulls. This relief is thus covered by the relief sought in the 1st batch of petitions which was confined to seeking stay in respect of shares pledged by the Borrowers.
- 4.21. When the second batch of petitions were taken up for hearing, the Senior Counsels representing Indiabulls stated that there was no need to file a formal reply. The reply already on record in respect of the 1st batch of the petitions be treated as a reply to the 2nd batch of petitions. In these circumstances, although the 1st batch of petitions have been revived, but the fact remains that the relief sought in the 2nd batch overlaps the relief sought in the 1st batch and therefore the outcome of the 2nd batch would prevail. Be that as it may, this order would dispose of the entire batch of petitions.

Contentions of the Petitioners

5. Mr. Darpan Wadhwa and Mr. Vivek Chib, Senior Advocates for the Petitioners, makes the following submissions:

NO EVENT OF DEFAULT

- 5.1. The loan facility granted in favour of the Borrowers has been arbitrarily recalled by Indiabulls *vide* loan recall notices dated 05th November, 2020 and 15th December, 2020, on account of an alleged '*impairment of the security*' under Clause 12.1.9 of the Loan

Agreement. The three ingredients of an Event of Default, as defined under Clause 12.1.9(a), being – (i) ‘*impairment of the security*’, (ii) causing the security to become ‘*unsatisfactory*’, and (iii) ‘*in the judgment of the lender*’ (i.e. Indiabulls) – are not met in the instant case. The same is demonstrated as below:

5.1.1. The term ‘Security’, as defined in Clause 1.1(xxix), has to be read to mean all securities provided by the Borrower, taken as a whole, and will have to be related to ‘*borrowers dues*’, which are defined in Clause 1.1(iv) to mean outstanding principal and other amounts payable by the Borrowers. In other words, Clause 12.1.9(a) gets attracted only if ‘*the Security*’ (i.e. all the securities as a whole) created in favour of Indiabulls become ‘*unsatisfactory*’.

5.1.2. The ‘*judgment of the lender*’ has to be exercised in a reasonable manner, as stipulated in Clause 12.3, which implies that the party cannot exercise unilateral discretion in an arbitrary manner. For this, Indiabulls should have taken into consideration whether the existing security was sufficient for fulfillment of all obligations, i.e., the outstanding principal amount. Indiabulls did not act in a reasonable manner, as the value of the security did not fall below the borrower’s dues as they stood as on 05th November, 2020. Therefore, no Event of Default can be said to have occurred for Indiabulls to have recalled the loan.

5.1.3. In fact, neither the cure notice as well as the loan recall notices state that the security has become ‘*unsatisfactory*’, as required under Clause 12.1.9(a). Thus, the same are illegal and arbitrary.

2X SECURITY COVER MAINTAINED

- 5.2. Mr. Wadhwa strongly relies upon Indiabulls’ own communication dated 3rd October, 2019 to highlight that Indiabulls offered to release the mortgage charge on one of the non-impaired properties at Noida (*being* Plot No. GH-1C, Sector 43, Noida). He contends that it is unfathomable how the impairment of a property of this quantum, could justify the cancellation of the entire loan amount of approximately Rs. 1600 crores, specially when the total security mortgaged towards Indiabulls was more than Rs. 5000 crores.
- 5.3. Indiabulls’ conduct itself is indicative of the fact that there is no Event of Default. As recently as 9th September, 2020, Indiabulls had issued a satisfaction letter certifying that the loan account of the Borrowers was standard and satisfactory.
- 5.4. The cure notice dated 5th November, 2020 was only with respect to property situated at GH-1B mortgaged by VCL. However, even if the value of the allegedly impaired securities is deducted from the total value of security cover offered, Indiabulls still holds mortgaged properties to the extent of approx. Rs. 5200 crores - which is more than the 2x security cover required under Clause 2.3 of the Loan Agreements (which amounts to Rs. 3372 crores).

NO FINANCIAL DEFAULTS IN PAYMENTS

- 5.5. There has never been a default in repayment of loans on the part of the Borrowers. They have followed the repayment schedule in letter and spirit. In fact, Indiabulls has, at its sole discretion, rescheduled the loan agreements various times in the past, however, it has never been the case that any reschedulment charges were imposed on Borrowers. Further, on account of the outbreak of COVID-19 pandemic, revised loan repayment schedule was provided to the Borrowers, towards which further PDCs and UDCs were obtained by Indiabulls from the Borrowers. Reschedulment charges towards loans rescheduled on account of the COVID-19 pandemic is inconceivable even in terms of the guidelines provided by the RBI.
- 5.6. Indiabulls has further concealed that a sum of Rs. 3.33 crores is currently lying in the escrow account of the Shipra Group which is in complete control and custody of Indiabulls.
- 5.7. In the past, Indiabulls has never banked on any of the security cheques provided by the Petitioners at the time of execution of the loan agreements / reschedulment.
- 5.8. Out of the total amount of Rs. 759 crores paid by the Petitioners, an amount of approx. Rs. 80 crores was adjusted from the Escrow Account and about Rs. 679 crores was paid by way of RTGS / new Cheques, as can also be seen from Additional Affidavit dated 12th April 2021.

- 5.9. Further, Indiabulls by presenting the post-dated cheques of the Borrowers, has acted in contravention of the Loan Agreements. In fact, post-dated cheques were part of the original repayment schedule and not a part of the new repayment schedule that was agreed upon in September, 2020 and payments were, in fact, to be made by other modes such as withdrawal from escrow accounts, RTGS and through new cheques, and the same cannot be denied by Indiabulls.
- 5.10. That even as per the case of Indiabulls, there was no financial default by the Borrowers since admittedly, the Loan Recall Notice dated 5th November, 2020 has been issued on the basis of 'impairment of the security' under Clause 12.1.9 and no averment has been made by Indiabulls regarding financial default in the loan re-call notice.
- 5.11. There is no default in the repayment of loan, and in fact excess amount has been paid by the Borrowers. In absence of any financial default, no Event of Default could have been triggered in the facts of the instant case that would have entitled Indiabulls to take recourse to enforcing the securities in the manner in which they have sought to do.
- 5.12. Further, even as per the reply to the Additional Affidavit dated 9th April 2021, installments in only five loan accounts were due on 5th April 2021 and the alleged default is only towards the installment due in April 2021, which is disputed by the Borrowers. Further, as per the repayment schedule in place, the Petitioners were liable to pay Rs. 70,85,74,141/- as on 5th April, 2021 but, Indiabulls instead presented the cheques for an amount of Rs. 75,03,86,792/-. In furtherance of the

dues to be cleared as per the new repayment schedule, the Petitioners have submitted cheques for a total amount of Rs. 66.98 crores and the remaining amount of Rs. 3.3 crores is covered by the amount lying in the escrow account which is in the control of Indiabulls. Therefore, Indiabulls is fully secured.

- 5.13. Indiabulls has admitted in its reply before this Court that the aforesaid amounts were paid in advance. However, a fallacious case is being brought about to say that the dues were recovered towards reschedulment fees. In doing so Indiabulls has failed to place on record any tax invoice towards reschedulment fees as is purportedly being claimed by Indiabulls – clearly demonstrating the falsity of Indiabulls’ stand. Further, Indiabulls has unilaterally, at its own whims and fancies and only with a view to mislead the Court, purportedly claimed the aforesaid charge without there being any such contractual understanding or agreement.
- 5.14. Once the termination of loan is sought by Indiabulls and a loan recall notice has been issued, they cannot, in the same breath, expect a continued re-payment of principal on the date of EMI as per the repayment schedule to the Loan Agreements. Moreover, the recall for the entire loan amount would also include the EMI amounts due to it as on 05th April, 2021. Indiabulls, therefore, cannot agitate fresh Events of Default by calling non-fulfilment of EMI for April, 2021 as an Event of Default. This is just a method of seeking payment under the garb of EMI cheques. Further, any component of interest, if due thereon, is determinable by the arbitrator, and cannot arbitrarily be

added to EMI amount by Indiabulls at the time of encashing Borrowers' cheques to that effect.

INDIABULLS' MALA FIDE CONDUCT

5.15. The recall of loan is a *mala-fide* action of Indiabulls based on illegal action of Noida Authority's notice dated 4th September, 2020. In any event, the aforesaid notice is subject matter of writ proceedings before the Allahabad High Court and the legality is *sub judice*. Indiabulls sought to take advantage of the revocation notice issued by the Noida Authority, despite being fully aware that no Event of Default has occurred that permitted or justified the recall of the entire loan facility. Without waiting for the outcome of the proceedings before the Allahabad High Court, Indiabulls in an illegal and hurried manner, only with intent to somehow grab the assets of the Borrowers and transfer them at a discount to the Borrowers' competitor (DLF Home Developers Limited), wrongly invoked the securities. All such actions exhibit *mala fide* conduct of Indiabulls.

5.16. Indiabulls is *malafidely* under-valuing the mortgaged properties. It cannot simply be presumed without any cogent reason that the value of these properties has fallen. It is pointed out that Godrej is constructing a premium luxury project on its adjacent land in Sector 43, Noida; a similar plot of land owned by one Shipra Group companies in the vicinity is fetching a value of about Rs. 500 crores for 10 acres; and further, the 73 acres of land at Sector 128 is better located and can be valued at even higher rate of approximately Rs. 5000 crores.

PLEDGED SHARES OF KDPL

5.17. *Vide* order dated 16th April, 2021, the Division Bench of this court, while remitting the matter to the Single Judge, also noted Indiabulls' undertaking to conduct fair valuation of shares and ensure transparency with respect to invocation of the pledged shares of Shipra Group companies. However, the *mala fide* conduct of Indiabulls is evident from the fact the within a few hours from the passing of the above order, on the same date, Indiabulls hastily issued a notice of sale in relation to the pledged shares of KDPL, and the shares were proposed to be sold at a grossly undervalued price of Rs. 840 crores. The sole asset of KDPL, being a plot of land that forms the basis of valuation of the shares was valued lesser than even the circle rate in the area (*being* Rs. 1550 crores). Mr. Wadhwa contends that the alleged sale of shares is completely in contravention to the directions of the Division Bench's order dated 16th April, 2021 as mentioned above.

5.18. Indiabulls has contended that the pledged shares of KDPL have already been sold to DLF Homes on 20th April, 2021. However, no document has been placed on record as a proof thereof. In fact, during arguments before the learned Sole Arbitrator, the counsel for Indiabulls conceded that the sale of shares of KDPL was not complete, which is in complete contradiction to the submissions of Indiabulls made in its sworn affidavit. It is clear that the same has been done only with a view to render the prayers of the Borrowers infructuous and to overreach the judicial process.

5.19. Further, the sale of the shares of KDPL has been done opaquely and in gross violation of the provisions of the Depositories Act, 1996 read with Regulation 58 of SEBI (Depositories and Participants Regulations, 1996 corresponding to Regulation 79 in SEBI (Depositories and Participants) Regulations, 2018, in connivance with the Depository Participant (namely Dhani Stocks Limited), which is a subsidiary company of Indiabulls itself.

RELIEF UNDER SECTION 9

5.20. The objective of a Section 9 petition is to preserve/secure the disputed amount in question. The ground of alleged impairment of certain securities, in itself, should not persuade the court to decline Petitioners' prayer for grant of interim protection here.

5.21. No harm would be caused to Indiabulls if the interim reliefs are granted, as their loans are fully secured and all disputes arising thereof can be decided by the arbitrator.

5.22. On the contrary, irreparable loss would be caused to the Petitioners, as: (i) third party rights will be created upon the property; (ii) being an unlisted company, the valuation of KDPL's shares would be arduous and would make the determination of damages difficult; (iii) apart from the valuation of the underlying property of KDPL at approx. Rs. 3000 crores, it also has further value in the nature of future profits which would arise from the projects developed on it; (iv) reducing the corpus available to it by more than Rs. 3000 crores will severely jeopardize the rights of the Petitioners in trial/arbitration; (v) even if the Petitioners succeed in arbitration, they would be unable to recover

their property which would only get awarded merely the damages;
(vi) It would cause irreparable loss on to the Petitioners as the biggest portion of the corpus of the Petitioners' assets would stand disposed of, thereby defeating the objective of Section 9 of the Act.

Contentions of the Respondent

6. Per contra, Mr. Rajiv Nayar, Mr. Sandeep Sethi and Mr. G. Tushar Rao, Senior Advocates appearing for Indiabulls, have made the following contentions:

IMPAIRMENT OF THE SECURITIES IS AN EVENT OF DEFAULT

- 6.1. The non-payment of conditional dues to Noida Authority from date of issuance of no-objection certificate by Noida Authority (being 28th February, 2018) till the date of revocation of permission (being 2nd and 4th September, 2020), amounted to nullification of the Mortgage Deeds dated 28th February 2018, which were conditional upon such payment. Such wilful impairment of securities by Shipra Group puts Indiabulls at risk constitutes as an Event of Default as per Clause 2.2 read with Clauses 12.1.9(a) and 12.1.9(h) of the Loan Agreements.
- 6.2. The impairment of the mortgaged properties is well-admitted by the Petitioners in the Section 9 petitions before this court, as well as in the writ petitions before the Allahabad High Court.
- 6.3. Indiabulls gave ample notice to the Petitioners (*vide* notices dated 20th October, 2020, 05th November, 2020, 10th December, 2020, 15th December, 2020, and 14th January, 2021) to cure such defect/impairment of securities. However, no response was received from

Shipra Group, and thus the extant measures have been rightly resorted to, which are entirely in compliance with the terms of the loan agreements between the parties.

INDIABULLS SHOULD NOT BE INJUNCTED UNDER SECTION 9

6.4. The fact that this default towards Noida Authority has occurred despite a loan disbursal of Rs. 1686 crores to the Shipra Group, coupled with the fact that all 6 mortgaged properties continue to remain undeveloped despite the loan sanctioned for their development, raises concerns with Indiabulls, as the Loan was sanctioned on the basis of projected cash flows from the development of said properties. The non-development thereof is also a probable cause for cancellation of allotment by the municipal authorities.

6.5. Indiabulls has a financial exposure to the tune of Rs. 1763 crores across the 14 Loan Agreements, and there is legitimate fear and apprehension of default by Shipra Group on account of its poor financial health, which is evidenced by:

- i. Non-payment of dues to Noida Authority since February 2018 — to the tune of Rs. 38 crores each for the 2 impaired properties (which was, as of 31st July, 2020, to the tune of Rs. 219 crores each) to perfect the mortgaged securities.
- ii. Financial default in repayment of dues of Indiabulls — Immediately after obtaining an Interim order from the Court on the premise that there was no financial default by the Borrowers, the Borrowers defaulted on the payment of dues of

Rs. 70 crores on 5th May, 2021, which was also admitted in their Additional Affidavit dated 10th April, 2021, before this court.

iii. Default in repayment of third-party lenders —

- a. As per CIBIL report dated 12th May, 2021 of Commercial Credit Information Authority, the Borrowers are in default of Rs. 35.60 crores for 540 DPD (Days Past Due). For another lender, the CIBIL report also indicates that the payment of Rs. 7.73 crores has been overdue.
- b. Default in payment of dues of Capital India — By the email dated 12th May, 2021, Capital India has confirmed to Indiabulls that the Petitioners/Borrowers have an outstanding exposure of Rs. 12.75 crores (including penal interest, etc.).
- c. Default in payment of dues of Tourism Finance Corporation of India — As per further information available, the Borrowers have defaulted in paying an installment of mere Rs 35 lakhs towards a loan facility availed from Tourism Finance Corporation Ltd, which is not controverted by the Borrowers.

6.6. Indiabulls is apprehensive that on account of the other defaults committed by Shipra Group, any one of such lenders may invoke their remedies under the Insolvency and Bankruptcy Code, 2016, which would result in rendering Indiabulls' remedies ineffective, as: (i) a moratorium would be put in on litigations and arbitrations, (ii) the

pledged shares' value would become zero in light of the resolution process, and (iii) if proceedings under the IBC are invoked against KDPL by any of its creditors, the only asset available with KDPL being the sub-lease of plot of land is liable to be cancelled and the said asset would not even be a part of resolution process leading to nil realization of dues by Indiabulls. Thus, any delay in recovery of dues will be highly prejudicial to Indiabulls.

- 6.7. The non-payment of dues to other lenders constitutes a separate and distinct Event of Default by itself, under Clause 12.1.9 (b) of the Loan Agreement.
- 6.8. If the Borrowers are unable to pay the loans and Indiabulls is left with no means to recover it, the loan accounts would be declared as Non-Performing Assets (NPAs) and the same would adversely affect balance sheet of Indiabulls, which, being a public company disbursing loans from public funds, is accountable to its investors and shareholders. Thus, Indiabulls should be allowed to take timely and effective measures to recover its legitimate dues from defaulting Borrowers (especially Borrowers in financial distress). If such recovery is allowed to be interdicted at the instance of a Borrower, it would have a catastrophic impact on the financial system.

2X SECURITY COVER REQUIREMENT IS DISTINCT FROM CREATION OF SECURITY

- 6.9. The creation of the security under Clause 2.2 of the Loan Agreements cannot be confused or intermixed with the independent obligation of the Shipra Group to maintain 2x security cover of the borrowers' dues in terms of Clause 2.3 of the Loan Agreements. The obligation to

create named securities forms the very premise of sanctioning of the loan facility. In fact, the obligation is recorded in the Sanction Letters itself, wherein the obligation of maintaining a '2x Security Cover' is not even mentioned.

- 6.10. Clause 2.3 is applicable only in those cases where there is fluctuation of valuations of mortgaged properties due to market forces. In such an event, Borrowers are obligated to provide additional Security to make good the shortfall in the Security Cover. Further, the maintenance of a security cover, as per Clause 2.3 of the Loan Agreement, is itself *“without prejudice to the other provisions of the Loan Documents.”* Thus, creation of securities under Clause 2.2 is an independent and primary obligation of the Borrowers, and its non-creation and/or impairment is an independent Event of Default, under Clause 12.1.9 (a) and (h) of the Loan Agreements.
- 6.11. The incongruity of the contention of the Petitioners is further amplified by the fact that if the 2x security cover prohibits an Event of Default, then even in a case of non-payment of dues, Indiabulls could not be entitled to invoke the securities, as Shipra Group could still contend that Indiabulls is protected with two times the Security Cover.
- 6.12. If one were to accept the Petitioners' argument that the obligation of Shipra Group was only to create securities in terms of the value of the dues, then it is inconceivable as to why it would create such securities upon mortgaged properties which, as per its own valuation, are to the tune of approx. Rs. 5000 crores, when the disbursal was only in the range of approx. Rs. 1100 crores and was done prior to the creation of

such mortgaged securities. Thus, this argument of the Petitioners is completely misconceived and cannot be accepted.

6.13. There is no converse obligation on Indiabulls to release any security in the event the value of the primary securities is more than twice the value of the Borrowers' dues.

6.14. The valuation of securities is of no consequence to the dispute, inasmuch as all mortgaged properties mentioned in the Sanction Letter, irrespective of their valuation, had to be maintained with Indiabulls till the event the entire loan was discharged.

FINANCIAL DEFAULT HAS OCCURRED

6.15. The Petitioners have misrepresented before this Court that cheques bearing No. 162286 and No. 162287 were given as advance payments of the EMIs falling due on 05th April, 2021, by concealing that an email was issued to them on 14th July, 2020 delineating reschedulement charges of Rs. 20,72,01,937/- and advance interest of Rs. 23.125 crores.

REGARDING PLEDGED SHARES OF KDPL

6.16. As KDPL is merely a confirming party to the Pledge Agreement, and not a borrower under the Loan Agreement, no rights, and only certain obligations, have been conferred upon it (under Clause 5.2 of the Pledge Agreements titled '*The Confirming Party's Undertakings*'). Moreover, as this is a dispute between the pledgee (Indiabulls) and the pledgors (Shipra Group and promoters), the confirming party has no right to dispute the invocation of pledge by Indiabulls. Thus, the

petition filed by KDPL (*being* OMP(I)(COMM.) 155/2021) which is limited to the dispute arising out of the invocation and sale of pledged shares is not maintainable.

- 6.17. Section 177 of the Indian Contract Act, 1872, allows a pledgor to only redeem the pledge before the actual sale. The pledgor has no right to challenge the invocation or the sale pursuant to the invocation. In this regard, reliance is made to the judgments in *Lallan Prasad v. Rahmat Ali & Another*,⁴ and *Prime Broking Company (India) Ltd. v. National Securities Clearing Corporation Ltd.*⁵
- 6.18. Indiabulls is exercising its contractual rights and no injunction can be granted in respect of the same. In this regard, reliance is placed upon the judgments of this court in *Tendrill Financial Services Pvt Ltd. & Ors. v. Namedi Leasing & Finance Ltd. & Ors.*,⁶ *Cyquator Media Services Pvt Ltd. V. IDBI Trusteeship Services Ltd. & Anr.*,⁷ and *Avantha Holding Ltd v. Vistra ITCL Ltd.*⁸
- 6.19. The objection made by Shipra Group on valuation of sold pledged shares is a matter of accounting which can be arbitrated upon by the arbitral tribunal. The only remedy available to Shipra Group is to seek damages in case of undervaluation of shares at the time of sale, when the amounts realized by Indiabulls from the sale of securities will be set off against the amount of Rs. 1763 crores due from Shipra Group. It is a settled position in law that mere doubt as to the valuation does

⁴ AIR 1967 SC 1322.

⁵ 2017 SCC Online Bom 43.

⁶ 2018 SCC Online Del 8142.

⁷ FAO(OS)(COMM.) 75 of 2020.

not entitle the Petitioners to approach this court to stop the sale of pledged security itself.

- 6.20. The sale of the pledged shares has been done in a completely transparent manner. Indiabulls has obtained valuation reports of 3 independent and reputed valuers - Jones Lang LaSalle Property Consultants (India) Pvt. Ltd., Grant Thornton Bharat and one Mr. Kapil Maheswari (Registered valuer). Moreover, such valuation has to be ultimately determined by the Arbitrator, in case the Petitioners were to contest the same.
- 6.21. The letter issued by Indiabulls in October 2019, offering to release the mortgage for Rs. 27 crores, does not imply that the value of the property was in fact Rs. 27 crores. Rather, this property was given for a lease premium for approximately Rs. 321.75 crores by Noida Authority to VCL in 2017. In fact, this property (*being* Plot No. GH-IC, Sector 43, Noida) was also charged to M/s Indiabulls Commercial Credit Limited ('ICCL'), a subsidiary to Indiabulls herein, as one of the securities for the loan facilities to the tune of Rs. 440 crores.
- 6.22. Mr. Rao points out that the Petitioners did not approach this court with clean hands, as till date they have made no attempt to show their *bona fides* by contacting Noida Authority and making payment of their dues to it. Besides, no effort has been made to replace the impaired security. Thus shows their clear intention is not to honour their obligations on the loan.

⁸ 2020 SCC Online Del 1717.

- 6.23. Mr. Nayar also raises the point that the Petitioners are free to buy-out the pledged shares at the so-called under-valued rate, instead of alleging clandestine sale and sacrificing away a legitimate buyer.
- 6.24. Mr. Sethi additionally argued that mutual trust and confidence is key in such transactions of utmost good faith, and that this is a case of loss of faith of a lender in the borrower's repayment capabilities. The 2x security cover is only a safe-keeping measure to assist in a coercive measure, if needed in future, but merely holding such securities is not enough to satisfy Indiabulls' commercial interests.

Rejoinder Submissions

7. Mr. Darpan Wadhwa and Mr. Vivek Chib, learned Senior Advocates for the Petitioner, in their rejoinder, vehemently argued that the financial health of the Borrowers is secured and contentions regarding the same are bald speculations. Indiabulls has not, subsequent to the alleged Event of Default, carried out any valuation of the secured mortgaged properties to determine their present-day value. Mr. Wadhwa argues that the valuation of the property given by Indiabulls is grossly underestimated. The three reports of valuation relied by Indiabulls, are of no significance. Two of such reports adopt the valuation done in the first report. Two valuation reports are not through registered valuers as stipulated under Section 247 of the Companies Act, 2013, and thus cannot be considered to be authentic. The reports are in complete ignorance and disregard to the circle rates of the Property notified by the Government and provide no reasoning as to why the valuation is being done below the circle rates. The circle rate is a *prima facie* evidence of the valuation of the properties and in this regard, he relies upon the

judgment of this Court in **GNCTD v. CTA Apparels**.⁹ It was further argued that the presumptions surrounding IBC proceedings are not based on any evidence or probable reasoning either. Moreover, the argument that the financial health of the Borrowers is in itself an event of default is a new argument and a clear after-thought based on conjectures, which has never been raised in any communications or pleadings before this court and deserves to be rejected on this ground alone. The present loan agreement is purely a commercial, contractual transaction between two private entities, and thus any reliance on ‘public interest’ by Indiabulls is misleading and baseless. They controvert the reliance on **Tendril Finance** (*supra*) on the ground that the said judgment lays down that the invocation of pledge of dematerialized shares shall be governed by Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996, which specifically provides that the pledgee can invoke the pledge “*subject to the provisions of the pledge document*”. Thus, in terms of the Pledge Agreement herein, Indiabulls is allowed to invoke the pledge only on account of an Event of Default under the Loan Agreements, which has demonstrably not occurred. Mr. Chib also urges that clauses 2.2, 2.3 and 12.1.9 of the loan agreements have to be read together, harmoniously, and in a commercial sense. Lastly, Mr. Darpan Wadhwa on instructions, states that he has a Letter of Intent from buyer who is interested in purchasing 10 acres out of the 73 acres in Sector 128 for a value of Rs. 575 crores. He submitted that in case the Court were to grant time, such options can be explored, and the Borrowers can take steps to redeem their securities.

⁹ 2020 IIAD (Delhi) 97 : MANU/DE/4615/2019.

Analysis and findings

8. The Court has given anxious consideration to the contention of the parties especially taking into consideration that the loan amount in dispute is significant. The dispute between the parties relates to the invocation of the Event of Default clause by Indiabulls, pursuant to which Loan Recall Notices have been issued. Thus, it is imperative to analyse the relevant Clauses, which, for the sake of reference, are reproduced hereinbelow:

“2.2 SECURITY AND ADDITIONAL SECURITY

To secure, to the satisfaction of the Lender, the fulfilment of all the obligations of the Obligor(s) under the Loan Documents including payment of the Borrower's Dues and other amounts by the Obligor(s) to the Lender under the Loan Documents, the Borrower(s) hereby undertake(s) to forthwith create, and/or shall cause the Obligor(s) to forthwith create, (a) such Security in favour of the Lender as mentioned in the Loan Documents (including those mentioned hereunder) and (b) such other additional Security of adequate value (to the satisfaction of the Lender), if the Lender so requests from time to time for any reason(s) whatsoever including due to inadequate value (in the opinion of the Lender) of any Security and/or the Lender's right on any Security getting adversely affected in any manner pursuant to, inter alia, injunction/stay order/freeze/attachment of any Security or any part thereof. The Borrower(s) shall, and/or shall cause the Obligor(s) to, (a) forthwith execute and register, if required, appropriate Security Documents and other agreements/deeds relating thereto (in a format acceptable to the Lender) and (b) take/obtain a written no objection certificate ("NOC") from the Lender (which shall be unreasonable withheld) prior to, inter alia, any application(s), agreement(s), document(s) and/or contract(s) for/of/relating to, inter alia, sale, conveyance, transfer, lease, possession, sub-lease, rent, leave and license, negative lien, assignment, development, lien, charge, third party rights/interests, allotment and/or encumbrance (in any manner) of the Security (and/or any portion/unit thereof). Unless otherwise mentioned in the Loan Documents, the Borrower(s) further undertake that it shall, and shall cause the Obligor(s) to, forthwith execute the Security documents and create the first-ranking mortgage charge/pledge/hypothecation (in a mode/manner acceptable to the Lender) over the Security exclusively in favour of the Lender before or at the time of entering into this Agreement. Any failure/delay in execution of the Security Documents and creation of the Security as aforesaid shall be an Event of Default under the Loan Documents. The Borrower(s) shall, and/or shall cause the Obligor(s) to, execute/to issue a Power of Attorney authorizing/empowering the Lender to, inter alia, allot, sell, transfer, lease, sub-lease, assign, mortgage, encumber, construct and/or develop the Security (and/or any part/unit thereof). The powers under such Power of Attorney will be exercised by the Lender on or after occurrence of an Event of Default under the Loan Documents.

a) xx ... xx ... xx

b) Mortgage of the Mortgaged Properties

The Borrower(s) shall cause the Mortgagor(s) and the Mortgagor(s) shall agree; to make out, to the satisfaction of the Lender, a good and marketable title to the Mortgaged Properties, which shall be exclusively mortgaged in favour of the

Lender and shall cause the Mortgagor(s) to obtain and the Mortgagor(s) shall agree to obtain, all Authorisation(s) to execute such documents, forms, writings, etc. as may be necessary for the purpose of creating such mortgage and/or registering the same with the competent authorities and shall further comply with all formalities as may be necessary or required for the said purpose by the Lender. The Borrower(s) shall, and/or shall cause the Mortgagor(s) to execute/to issue a Power of Attorney (in the form and substance acceptable to the Lender) in favour of the Lender authorizing/empowering the Lender to, inter alia, allot, sell, transfer, lease, sub-lease, assign, mortgage, encumber, construct and/or develop the Mortgaged Properties (and/or any part/unit thereof).. The powers under such Power of Attorney will be exercised by the Lender on or after occurrence of any Event of Default under the Loan Documents.

c) to i) xx ... xx ... xx

2.3 SECURITY COVER

The Borrower(s) shall, and/or shall cause the Obligor(s) to, maintain the Security Cover as stipulated in Schedule I hereunder at all times during the validity of the Loan Documents ("Security Cover"). For the purposes of calculating the Security Cover, only the value of the immovable properties ("Mortgaged Properties") mortgaged in favour of the Lender to secure, inter alia, the Group Borrower's Dues shall be taken into consideration. If at any time during the continuance of this Agreement, the Lender is of the opinion that the value of the Mortgaged Properties has become inadequate to maintain the Security Cover, then whether or not the Lender advising the Obligor(s) to that effect, within fifteen days the Borrower(s) shall forthwith provide and furnish and/or shall cause the Obligor(s) to forthwith provide and furnish to the satisfaction of the Lender, either cash or such other Security (acceptable to the Lender) to the satisfaction of the Lender to make good the shortfall in the Security Cover so as to maintain the Security Cover at all times. The Lender shall be entitled to make a call for additional Security to the Borrower(s) if the Security Cover is not maintained and the Borrower(s) shall be bound to forthwith (within fifteen days) provide/create additional Security to the satisfaction of the Lender. **Without prejudice to the other provisions of the Loan Documents, the Lender shall have the right to recall the Loan/Borrower's Dues in part or in full or exercise other rights under the Loan Documents including sell, transfer, dispose of, encumber and/or deal with the Security, or any part thereof, in any manner if the Security Cover is not maintained.**

The value of any Security shall be calculated by a valuer acceptable to the Lender or as deemed fit by the Lender. The cost of valuation of any Security shall be borne only by the Obligor(s) and the same shall be forthwith payable. Further, the valuation of the Security shall be done as and when required by the Lender and in any case, the Obligor(s) will provide the valuation of the Security (as aforesaid) at least once in a financial year.

12. EVENTS OF DEFAULT

12.1 Each of the events or circumstances set out herein is an Event of Default.

12.1.9 Others

(a) **If there is any deterioration or impairment of the Security, if any, or any part thereof or any decline or depreciation in the value or market price thereof (whether actual or reasonably anticipated), which causes the Security created in favour of the Lender, in the judgment of the Lender to become unsatisfactory as to character or value and the Borrower(s) fail to provide Additional Security.**

(b) to (g) xx ... xx ... xx

(h) If any circumstance or event occurs which is prejudicial to or impairs or imperils or is likely to prejudice, impair or

imperil the Security (or any part thereof) or any other Security given by the Obligor(s) or any part thereof;"
(emphasis supplied)

WHETHER 'IMPAIRMENT OF THE SECURITY' IS AN EVENT OF DEFAULT?

9. The Petitioners' primary bone of contention is that the recall of the loan facility on account of an alleged '*impairment of the security*', based on a notice issued by Noida Authority which is sub-judice, does not create any impairment, as the value of the remaining securities listed in para 4.4 of this judgment (including the other non-impaired mortgaged properties as mentioned in para 4.4.1), was greater than two times the Borrowers' dues, thereby being fully in conformity with Clause 2.3 of the Loan Agreements by maintaining a 2x security cover at all times. Let us look at all aspects of this argument one by one.

10. The first question here is whether Clause 2.2 can be interpreted in the way suggested by the Petitioners. Mr. Vivek Chib, Senior Counsel for the Petitioner has attempted to give a different hue to the controversy. He gave an elaborate elucidation of his own interpretation of Clause 2.2, 2.3, 12.1.9 (a) and other clauses of the Agreement, which has been noted in detail in para 5.1 of this judgment. The key points are summarized forthwith: Essentially, Mr. Chib argued, in order to exercise judgment under Clause 12.1.9(a), Indiabulls had to determine whether the value of '*the Security*' provided by the Petitioner was sufficient to secure the fulfilment of all obligations of the Borrowers, i.e., the payment of the 'Borrower's Dues' provided under Clause 1.1(iv) wherein it is expressly stated to be "...*the outstanding principal amount of the Loan and other amounts payable by the*

Obligor(s) to the Lender as per the Loan Documents...”. Due to the words ‘*principal amount*’ and ‘*other amounts payable*’ used in the aforesaid definition, it was argued that this Clause envisages payment of debt in *praesenti*. Next, he argued that the ‘*judgement of the lender*’ as stipulated in Clause 12.3 has to be exercised in a reasonable manner. He also argued that the word ‘*security*’ should be read to mean ‘all the securities as a whole’, and thus, in order to determine whether ‘*the Security*’ has become unsatisfactory under Clause 12.1.9(a), it would be imperative to see whether the value of all the securities available with Indiabulls as a whole, falls below the Borrower’s Dues as they stood on the day the recall notices were sent. Since sufficient securities are available with Indiabulls, no event of default could be said to have occurred on account of ‘*impairment of the security*’. Mr. Chib urged that his interpretation of the contractual terms is a plausible one, and which, if accepted by the Tribunal, would render Indiabulls’ actions unsustainable. And since that would require adjudication by the Arbitral Tribunal, which this court cannot go into, status quo should be directed to be observed, in order to preserve the subject matter.

11. In the *prima facie* opinion of the court, the clauses of the loan agreement cannot be interpreted as propounded by Mr. Chib. The term ‘*Security*’ as defined in Clause 1.1 (xxix) of the Loan Agreement is widely worded and means, ‘*as the context requires*’ - a mortgage, charge, hypothecation, escrow, guarantee, pledge, lien and/or other security interest created in the favour of the Lender. It cannot be construed that ‘*impairment of the security*’ as an Event of Default has to mean impairment of all the securities as a whole, or that, as long as the ‘*the Security*’ (meaning all the

securities as a whole) provided by Borrowers was sufficient to secure fulfilment of obligations, the judgment exercised by the Lender under Clause 12.1.9(a) would not be reasonable in terms of Clause 12.3. The clear use of ‘*and/or*’ in the Clause is indicative that the meaning of the word ‘*security*’ can be taken to either mean either each security individually, or to mean all the securities jointly. In such a situation, we are guided by the introductory part of the clause, which clearly stated that the meaning thereof has to be understood ‘*as the context requires*’. Further, Clause 12.1.9(a) uses the phrase ‘*impairment of the Security, if any, or any part thereof*’. Thus, even if we were to hypothetically accept that security must mean all securities as a whole, there is a clear provision for any part of the same to become impaired, leading to it becoming unsatisfactory in the judgment of the Lender, in which case, an Event of Default would occur. This argument, therefore, does not hold any water. Though, the correlation between the ‘*Securities*’ and the ‘*Borrower’s dues*’ is a novel argument, it is not a persuasive one, and would amount to misinterpretation of clause 2.2 for the purpose deciding whether an Event of Default has occurred. If a security is impaired, which causes it to become unsatisfactory as to character or value, the Event of Default would get triggered, regardless of the availability of other Securities to satisfy the borrower’s dues.

12. As regards the exercise of discretion, we must note that the parties have contractually agreed, on a plain reading of Clause 12.1.9(a), that the question whether the ‘*impairment of the security*’ has rendered the security ‘*unsatisfactory as to character or value*’ has to be decided by the Lender alone. That apart, one must bear in mind the dominant purpose of accepting

collaterals as security is to minimize the risk undertaken by a lender. In case of a default by a borrower, a lender can immediately take recourse against the same to offset its loss. In the instant case, the two impaired mortgaged properties were essentially collaterals for the Borrower's Dues and served as assets guaranteeing repayment. With the nullification of the mortgage, the option to offset the loss from these collaterals is now not available to Indiabulls. Thus, *prima facie* in the given facts, the exercise of discretion by Indiabulls cannot, by any stretch of imagination, be held to be unreasonable or arbitrary.

WHETHER AN IMPAIRMENT OF SECURITIES CAN OCCUR WHEN 2X SECURITY COVER EXISTS?

13. The Borrowers agreed to furnish securities under Clause 2.2 to secure the fulfilment of all their obligations, including the payment of 'Borrower's Dues'. Additionally, under Clause 2.3, read with Entry 14 of Schedule I of the Agreements, the Borrowers agreed to maintain a 2x security cover '*at all times during the validity of the Loan Documents*' of the combined dues of all the Borrowers. It was further provided that '*for the purposes of calculating the security cover, only the value of immovable properties ("Mortgaged Properties") mortgaged in favour of the lender to secure, inter alia, Group Borrower's Dues shall be taken into consideration.*' Since the two impaired securities provided under Clause 2.2 are immovable mortgaged properties, these two assets also formed part of the Security Cover in terms of Clause 2.3.

14. The securities stipulated in Clause 2.2 are the collaterals which form the foundation of the loan facilities, basis which Indiabulls agreed to sanction said loan facilities. These collaterals are thus required to be maintained throughout the term of the Loan Agreement. The court *prima facie* finds merit in the contention of Indiabulls that Clause 2.3 is applicable only in those cases where there is a fluctuation in the valuations of the mortgaged properties due to market forces during a particular period of time. It provides a safeguard, as Indiabulls, in such a situation, can insist on replenishment by way of additional securities in case of a shortfall and the Borrowers are contractually obligated to provide the security cover of more than two times the Borrower's Dues. In case the security cover is not maintained, it gives the right to Indiabulls to recall the Loan/Borrower's Dues under Clause 12.1.9(a) r/w 12.1.9(h), which delineate that any deterioration or impairment of a security which causes the security to become 'unsatisfactory' in the eyes of Indiabulls, and the failure of the Borrowers to provide additional security, would lead to an Event of Default.

15. On a plain reading of the clauses, it becomes apparent that the applicability of Clause 2.3 for maintaining 2x security cover, is in a different sphere and cannot be interlinked with the primary obligation of the Shipra Group to create and perfect the offered and named immovable securities as provided in Clause 2.2. In fact, the words "*without prejudice to the other provisions of the Loan Agreement*" used in Clause 2.3, clearly bring out this interpretation of the Contract. Therefore, the non-creation and/or impairment of the securities as provided in Clause 2.2 is an independent Event of Default and cannot be read in conjunction with the obligation of the

Borrowers to furnish the security cover as per Clause 2.3 of the Loan Agreement. The Clauses, when read harmoniously, do not lead to the interpretation, sought to be give by the Petitioners.

16. Much emphasize has been laid on Clause 2.3, and it has been strenuously argued that there are sufficient securities, multiples times the amount of Borrower's Dues, available with Indiabulls, such that it is fully secured and therefore should be restrained from enforcing the pledge. However, as already discussed above, since the remedy provided in Clause 12.1.9 is independent of the remedy stipulated for maintaining security cover, it becomes immaterial if the security cover with Indiabulls is today twice or thrice or sufficient to cover the outstanding dues. Thus, Petitioners' argument that notice by Noida Authority has not created any impairment in security, as the value of the remaining securities including the mortgaged properties mentioned above was greater than two times the Borrowers' dues, thereby being fully in conformity with Clause 2.3 of the Loan Agreements, is completely misconceived.

17. That apart, accepting the interpretation of the Borrowers would render Clause 12.1.9 and the various Events of Defaults stipulated therein to be otiose and will lead to absurd results. As illustrated by Mr. Sethi, if this argument is accepted, it would mean that existence of a 2x Security Cover interdicts an Event of Default, in which scenario, even a financial default of non-payment of dues would prevent Indiabulls to invoke the securities, as Shipra Group could merely contend that a default of, say, a 100 crores is not sufficient to trigger an Event of Default, on the same reasoning that

Indiabulls is protected with a 2x security cover. Mr. Sethi has also been quick to point out that there is no converse obligation on Indiabulls to release any security in the event the value of the primary securities is more than two times the Borrowers' Dues. For these reasons, the above argument of the Petitioners cannot be accepted.

18. The Borrowers have also resolutely contended that Indiabulls, recently, *vide* letter dated 3rd October 2019 offered to release the mortgage over the property at plot GH-1C, Sector 43, Noida, against the receipt of Rs. 27 crores, and now, unfairly, by alleging impairment of same security, a ground has been made to recall the entire loan of Rs. 1763 crores. This argument is made to demonstrate that that said action of Indiabulls is unjustified and as if they are taking advantage of the Notice issued by Noida Authority. However, the Court finds this submission to be devoid of merit. Since the recall of loan is in terms of the contract, and the remedies available under the contract enable Indiabulls to sell any or all of the properties, it is not for this court to prohibit or impede the action of Indiabulls. Further, the Court also finds merit in the contention of Indiabulls that the offer to release the property at Rs. 27 crores does not mean that the value of the property is also Rs. 27 crores. Pertinently, the Mortgagor did not pay the Rs. 27 crores to redeem the mortgage, and thus today, this argument is premised purely on conjectures and surmises. This contention would not entitle the Petitioners to seek restraining orders for the enforcement of the securities.

WHETHER AN EVENT OF DEFAULT HAS OCCURRED?

19. This brings us to the next question: Whether an Event of Default has indeed occurred, for Indiabulls to have triggered a demand under Clauses 12.1.9(a)? The said provision stipulates that if there is “*any deterioration or impairment of the Security*” or “*or any decline or depreciation in the value or market price*” thereof, “*(whether actual or reasonably anticipated), which causes the Security created in favour of the Lender, in the judgment of the Lender to become unsatisfactory as to character or value*” and, “*the Borrower(s) fail to provide Additional Security*”, then the Event of Default can be said to have occurred. On this aspect, the case is quite straight forward. It is an admitted fact that the following securities have become impaired: (i) Plot No. GH-1C situated at Sector 43, Noida, U.P. mortgaged by VCL and (ii) Plot No. GH-1B situated at Sector 43, Noida, U.P. mortgaged by RHL, in favour of Indiabulls, by way of two separate Mortgage Deeds, both dated 28th February, 2018. These lease-hold properties were mortgaged on the basis of an NoC granted by Noida Authority, subject to conditions as provided therein, extracted hereinbelow:

“1. The first charge of property will be of Noida in respect of the recovery of dues of the property such as lease rent, taxes rate any other charges and interest thereon.

2. In the event of foreclosure of the mortgage or charged property the lessor (New Okhla Industrial Development Authority) shall be entitled to claim and recover lease rent, taxes rate any other charge and interest thereon applicable from time to time and also such percentage of the unearned increase in the value of the plot as the authority may decided from time to time and the amount of Lessor's share of the said unearned increase shall also have first charge on the above said mortgage or charge. The decision of the Lessor in respect of the market value of the group housing plot shall be final and binding on all the parties concerned provided that Lessor shall have the pre-emptive right to purchase the mortgage or charge mentioned above after deducting the Lessor's share in the unearned increase aforesaid.

3. The Lessee shall pay immediately Noida dues calculated upto dated

03.02.2018 Rs.38.19.24,525/- (Rupees Thirty eight crore nineteen lacs twenty four thousand five hundred twenty five only) (Installment with interest Rs. 311843881/- + Late lease deed execution penalty Rs 7,00,80,644/-) to Noida.

4. Please note that the mortgage permission is subject to the conditions of lease deed/ sub lease deed may be utilized within one year from the date of issue of this letter.” (emphasis supplied)

20. Before this Court, there is no denial of the fact that the dues calculated up to 23rd February, 2018 amounting to Rs. 38,19,24,525/- have not been paid by VCL to Noida Authority. In these circumstances, on 4th September, 2020, the Noida Authority cancelled /revoked the permission granted vide letter 23rd February, 2018. The translated copy of this letter, *inter alia* reads as under:

“Subject: In reference to Plot No. GH-1/C, Sector-43

Sir,

Please take the trouble to refer to your Representation dated 10.8.2020, by which you have requested for grant of permission to mortgage in favour of M / s Beacon Trusteeship Limited (Security Trustee) against the above-mentioned plot. In the matter referred to, it is to be conveyed that in the order of your request in the past, the **mortgage permission was granted in favour of Indiabulls Housing Finance Limited against the plot through the office letter dated 23.2.2018 upon the condition that the allottee shall pay the dues of Rs. 38,19,24,525/- calculated till 03/02/2018 against the said plot to the Authority.**

But in order of the above, you have not yet paid the overdue against the plot, due to which an amount of Rs 219 crores is overdue on the plot calculated till 31.7.2020. Therefore, with regard to your Representation dated 10.8.2020, I have received instructions to inform you that it is not possible to accept your application due to non-payment of overdues against the said plot. In addition to the above, you are also made aware that the permission to mortgage issued in favour of Indiabulls Housing Finance Limited against the said plot through office letter dated 23.2.2018 is also revoked due to non-compliance of the said conditions.

Yours faithfully,

(Tejveer Singh)

Assistant General Manager (Group Housing)”

21. The position in respect of the other property mortgaged by RHL is identical. Thus, as can be noticed from the afore-noted communication, the amount of Rs. 38,19,24,525/- which was to be paid immediately in terms of the NOC granted on 23rd February, 2018, had become overdue to the tune of Rs. 219 crores for each of the properties (as of 31st July, 2020). Although the aforesaid communications are the subject matter of a challenge before the Allahabad High Court, but, it is an undisputed fact that the court has not granted any stay of the said communication and the amounts stated in the said letters have not been paid by either Mortgagors to Noida Authority till date.

22. The legal effect of the aforesaid communications is that the mortgage created by the Mortgagers, today, has perished, which puts Indiabulls in a serious jeopardy. Today, if Indiabulls were to enforce this collateral, it cannot do so. This is not just impairment but a complete obliteration of the prime securities. Indiabulls' request for additional security has gone unresponded. In these circumstances, the requirement stipulated in Clause 12.1.9(a), that the security has become impaired, has occurred. There cannot be reservations or uncertainty about this aspect. The payment of Rs. 38,19,24,525/-, in terms of NOC issued by Noida Authority was to be done immediately. Borrowers defaulted in making the payment leading this to not only become overdue but it has burgeoned to Rs. 219 crores each. This court finds merit in the contention of Indiabulls that the default did not occur on the date of cancellation of NoC, but was a continuing default, as the amount of Rs. 38 crores was payable "immediately" on 23rd February, 2018 when the NoC was first granted. Thus, this is nothing less than a wilful

impairment. Today, the court can only speculate as to the circumstances whereunder, without the payment to Noida Authority, the Mortgage Deed got registered, or the reasons for the delayed action of Noida Authority. These aspects would have to be examined in arbitration. Nevertheless, the fact of the matter is that Indiabulls cannot enforce the impaired securities, and is constrained to recall the loan. In these circumstances, the question arises whether the Court can interdict Indiabulls from taking recourse to the provisions of the Loan Agreement for enforcing other securities. The answer to this question has to be in the negative.

WHETHER FINANCIAL DEFAULT HAS OCCURRED?

23. This brings us to the next contention of the Borrowers regarding Financial default. It has been strongly contended that there has been no default of repayment of loan as on 5th April, 2021. The Borrowers claim to have made payment of an ad-hoc amount to the extent of Rs. 66.98 crores as advance which was to be adjusted towards the loan instalment falling due on 5th April 2021 as decided previously between the parties. The Petitioners claim that Indiabulls has wrongfully and maliciously presented cheques amounting to Rs. 75,03,86,792/- only in order to prejudice the present proceedings. On the other hand, Indiabulls refutes the contention and states that no payment was made as stated. In fact, the amount of Rs. 23,14,31,465/- has been paid not to the answering Respondent but to some other entity namely, Indiabulls Commercial Credit Limited (“ICCL”) by way of UTR No. BARB202009300274813462 (ICICI Bank Account ending - 1788). The Borrowers have deliberately misrepresented before this Court

that the aforesaid cheques i.e., cheque bearing No. 162286 and No. 162287 were given as advance payments of the EMIs falling due on April 05, 2021. The Borrowers have brazenly concealed the fact regarding email issued to it on July 14, 2020 in respect of reschedulement charges of Rs. 20,72,01,937/- and advance interest of Rs. 23,12,50,000/-. The borrowers, instead, claim that the amount credited to ICCL is for the purpose of repayment of the loans advanced to SEL itself.

24. The contentions of both the parties are completely at variance, as noted above. Simply put, this is an accounting dispute and it cannot be examined in the present proceedings.

25. Without getting into the above controversy, Even if, one were to accept that there is no financial default, it cannot discern the fact that there has been an Event of Default on the date of issuance of recall notices. The significant fact is that loan recall notices are dated 05th November 2020 and 15th December 2020. Indiabulls has recalled the loans on the sole ground of '*impairment of the security*' under Clause 12.1.9(a) and recalled the loan facility claiming the entire outstanding amount of Rs. 1763 crores. In pursuance to the said recall notices, Indiabulls proceeded to issue a purported Notice stating that it shall invoke the Pledge Agreements on 14th January, 2021. Thus, the afore-noted default in payments, with respect with EMI amounts due as on 5th April, 2021, are undeniably, after the issuance of the recall notices.

26. It cannot be denied that an Event of Default has occurred, irrespective

of whether there is financial default or not. It is not as if the default, categorised as a 'financial default', in comparison to a default contemplated under Clause 12.1.9 (a), have different consequences. The fact that the collaterals/mortgaged properties are not available for enforcement is, in fact, a default far more serious and fundamental than dishonour of an EMI. Therefore, this argument of the Petitioner does not convince this Court to grant the interim relief as sought for.

WHETHER SHARES OF KDPL ARE UNDER-VALUED?

27. As far as valuation is concerned, firstly, the Court notes that there is no challenge to that effect, as is evident from the reliefs sought in the present petitions, which are extracted hereinbelow:

“a. Restrain the Respondent No. 1, its officer, agents, representatives from transferring/ selling/ alienating, encashing / and / or disposing off or creating any third party rights or otherwise parting with any “Security” as envisaged under Clause 1.1(xxix) of the Loan Agreement and / or any Loan Document as defined under Section 1.1(xv) of the Loan Agreement including post-dated cheques provided in favour of the Respondent No. 1 in relation to the loans mentioned in Para 6.3 and any consequential actions; and

b. Restrain the Respondent No. 1, its officers, employees, assignees, or any person acting under instructions or on behalf of the Respondent from acting upon or in any manner whatsoever giving effect to notice dated 14th January 2021 and / or Notice dated 16th April 2021; and

c. Pass an appropriate direction restraining the Respondent No. 1 from taking any actions in relation to the “Loan Documents” defined under Section 1.1(xv) of the Loan Agreement till adjudication of disputes by the learned Arbitrator; and / or

d. Any other orders or directions that this Hon’ble Court deems fit in the facts and circumstances of the present case;”

28. Nevertheless, the counsels have made elaborate submissions on the

aspect of valuation. Borrowers allege undervaluation of the property mortgaged by KDPL and contend that the valuation reports placed on record by Indiabulls are erroneous and unreliable. On this aspect, it would be profitable to take note of the views of the Division Bench of this Court, made in the order disposing of the appeal filed by Indiabulls against in interim order as under:

“10. Mr. Gopal Jain, learned senior counsel for the respondent in FAO(OS) (COMM) 59/2021 then expresses an apprehension that the suspension of the said impugned order would mean that the appellant would be free to invoke the pledge of shares which would irreparably prejudice the interest of the respondents. In response, learned counsels for the appellant have submitted before us that the invocation of the pledge of shares will be undertaken in a completely transparent manner, on a fair evaluation of the shares and that the same would also be placed before the learned Single Judge. Needless to say, since the lis between the parties is pending before the learned Single Judge, such invocation of the pledge would obviously be open to challenge before the Court.”

29. Indiabulls is bound by the statement recorded in the said order, that the pledge of shares will be undertaken in a completely transparent manner on a fair evaluation of the shares. *Prima facie* the Court finds that the sale of the pledge shares is being done in a transparent manner. Indiabulls has disclosed the purchaser and also the amount at which the sale has been done. When the Petitioners filed an application asking for furnishing of documents, Indiabulls provided the same without hesitation. In fact, before commencement of arguments, Mr. Nayar candidly disclosed the amount of sale and offered that in case the Borrowers were interested to redeem the security, they could do so on payment of Rs. 900 crores. However, no interest was shown by the Borrowers.

30. On the aspect of valuation, we note that KDPL, the company whose

shares have been sold by Indiabulls to DLF, is a lease-holder and the title-holder of the plot of land, which is its only valuable asset. Thus, the valuation of the shares of KDPL has been done primarily on the basis of the value of the parcel of land, the shares having no other intrinsic value. Indiabulls supports its valuation on the basis of the reports on record, which are disputed and countered by the Petitioners. The valuation of land is not an exact science. It requires expertise, and certainly cannot be gone into in the present proceedings. The credibility of rival reports would be examined during the arbitration to determine which one is correct and realistic. At this juncture, the Court only has to see if the contractual terms as agreed between the parties under the Pledge Agreement have been adhered to. Undisputedly, notice of invocation had been issued by Indiabulls giving Borrowers and the Pledgor an opportunity to redeem, before proceeding with the sale of pledged shares. The Borrowers have neither provided additional security, nor redeemed the pledge. They have even failed to agree to the proposal of Indiabulls to pay/deposit Rs. 900 crores, being the sale consideration that it is receiving from DLF. Yet, the Borrowers seek restrain on the sale, alleging that there is *mala fide* motive in the sale, and that the shares are being sold for a song.

31. Indiabulls' interest lies in maximising the return from the sale of assets, in order to offset the cost of loans. Petitioners' contentions - that the sale of shares of KDPL for a trifling sum implies that shares are undervalued, and that the sale of shares to a competitor of the Borrowers at a discount is *mala fide* - are assumptions without any foundation. The urgency demonstrated by Indiabulls is predictable, as the assets secured are impaired

and as per its contention no other asset is sufficient to realize the outstanding dues. The circle rates of land alone cannot determine its market value and several other factors often come into play. The Judgment in **GNCTD v. CTA Apparels** (*supra*), relied upon by Mr. Wadhwa, is distinguishable on facts and does not support the case as sought to be advanced by the Petitioner. In fact, it goes against the Petitioners' arguments and states that circle rates ought not to be relied upon when disputes as to valuation have arisen. Relevant extract is as follows:

“On the basis of this circle rate, the Registering Authority can, at best mechanically determine the valuation of the instrument, but, whenever the dispute arises, the exact market valuation, ought to be arrived at, by the Collector as mandated by Section 47A of the Act. Circle rate cannot be mechanically followed by Collector, as a sole factor, to determine market value of the property in question.”

32. As discussed above, the objection made by Shipra Group on valuation of sold pledged shares is a matter of accounts, which can be only adjudicated upon by the Arbitral Tribunal, and the remedy available with the Borrowers is to claim damages. The Court cannot enter into the arena of what constitutes a fair valuation of shares. Does it mean that till the time the Arbitrator examines this question, Indiabulls should refrain from taking recourse as available to it under contract? In the opinion of the Court, having regard to the provisions in question, this Court cannot interfere on this aspect, and deprive Indiabulls from enforcing its right under the Pledge Agreement.

33. On the aspect of valuation and rights of the Pledge and the contention, we may note the case laws cited by the Respondents, wherein this Court has not interdicted the sale of pledged shares (See: **Tendrill Financial**

Services,¹⁰ *Cyquator Media Services*,¹¹ and *Avantha Holding*.¹²). In fact in *Avantha Holding* (supra), the court held that no such relief can be granted in a proceeding under Section 9 of the 1996 Act.

WHETHER RELIEF OUGHT TO BE GIVEN UNDER SECTION 9?

34. This brings us to the triple test of *prima facie* case, balance of convenience and irreparable harm. When we go into the aspect of *prima facie* case, the Court finds that in view of the facts noted above, no *prima facie* case is established for the grant of reliefs on merits in favour of the Borrowers for grant of injunction to restrain Indiabulls from enforcing its contractual rights. The next question is, where does the balance lie? Section 177 of the Contract Act gives the limited right to the pledgor to only redeem the pledge. In the present case, after the default was notified to the Borrowers, they undoubtedly made no efforts to provide additional security and redeem the pledge, despite opportunities been provided to them to cure the defect of the mortgages, pay monies under loan recall notices or redeem the pledges. Thus, the balance of convenience is in favour of Indiabulls. Further, Indiabulls' apprehension that today it is running the risk of losing all the securities as well as the loan provided to Borrowers, on account of being rendered unsecured in the event of any possible action under the IBC by any of the other lenders of Borrowers, cannot be said to be mis-founded. Further, the Court also find merit in the submissions of Mr. Sethi that Indiabulls, having lost faith in the Borrowers, in the light of the facts noted

¹⁰ 2018 SCC Online Del 8142, at Para 21 (B,C,E,F,K).

¹¹ FAO(OS)(COMM.) 75 of 2020 at Para 21.

¹² 2020 SCC Online Del 1717 at Para 60-62.

above, cannot be forced to continue to deal with the Borrowers. At the time of lending, the repayment plans are drawn up, keeping the risk factors and the securities offered by the Borrowers. Thus, if the collaterals/securities which were to serve as insurance against loss, became unenforceable and ineffective, Indiabulls' confidence would have certainly plummeted. Indiabulls, as a lender, is bound to feel worried as two of the six mortgaged properties have vanished. The business of lending does not simply rest on the value of collaterals, and existence of securities can never counterbalance the lack of trust. Looking at the Borrowers' track record in light of recent events, and the trends in the real estate market, Indiabulls' confidence in the Borrowers has been unsurprisingly shattered and they have the right to resist any effort to stall their process of recovery. The Borrowers, having declining to redeem the pledge, cannot be permitted to plead irreparable harm and injury. In view of the above, Petitioners have failed to meet the three-pronged test.

35. On the proposal given by Mr. Wadhwa for seeking time to be given to the borrowers to arrange for funds, Mr. Nayar has firmly refused to indulge, contending that in matters relating to sale of land, since statutory authorities are involved, permission to sell a portion of land would not come easily, and any concession on the part of Indiabulls would unnecessarily delay the entire process, specially having regard to the current market situation. Thus, Indiabulls is not willing to accept this option and the Court finds no reason to interfere.

36. In view of foregoing, the Court does not find any merit in the present

petitions and accordingly, the same are dismissed.

37. In view of the aforesaid decision, the undertaking given on 3rd May, 2021 by Mr. Mukul Rohatgi, Senior Counsel for Indiabulls, before the Arbitral Tribunal under Section 17 of the Act, stands discharged.

38. It is clarified that the observations made by this Court are only on *prima facie* basis for the purpose of deciding the present petitions, and would not come in the way of the Arbitral Tribunal in adjudicating the dispute between the parties.

MAY 20, 2021

'nk,v,nd'

(corrected and released on 26th May, 2021)

SANJEEV NARULA, J