



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Item No. 106
(IB)-541/ND/2022
IA-5710/2023, IA-4140/2023

IN THE MATTER OF:

(Under Section 7 of IBC, 2016)

M/s Orbis Trusteeship Services Private Limited

**... Applicant/
Financial Creditor**

Versus

Kindle Infraheights Private Limited

**... Respondent/
Corporate Debtor**

AND IN THE MATTER OF IA. NO. 5710/ND/2023:

(Under Section: 60(5) of IBC, 2016)

Kindle Infraheights Private Limited

C-60, Vikas Marg, Preet Vihar
New Delhi – 110092

... Applicant

Versus

Orbis Trusteeship Services Private Limited

4A, Ocus Technopolis Golf Club,
Sector 54, Gurugram, Haryana-122002

... Respondent

AND IN THE MATTER OF IA. NO. 4140/ND/2023:

(Under Rule 11 of NCLT Rules, 2016)

Kindle Infraheights Private Limited

C-60, Vikas Marg, Preet Vihar
New Delhi – 110092

... Applicant

Versus

Orbis Trusteeship Services Private Limited

4A, Ocus Technopolis Golf Club,
Sector 54, Gurugram, Haryana-122002

... Respondent

Under Section: 7 of IBC, 2016

Order Delivered on: 11.09.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)



PRESENT:

For the Applicant : Adv. Sumesh Dhawan, Adv. Malika Kamal, Adv. Nikil Ranti Kapoor, Adv. Devarayan, Adv. Vatsala Kak, Adv. Shaurya Shyam, Adv. Pranjit

For the Respondent :

ORAL ORDER

The present petition has been preferred by the Orbis Trusteeship Services Private Limited in the capacity as the Debenture Trustee qua Debenture Holder i.e. Asia Pragati Strategic Investment Fund. The Principal Borrower/Corporate Debtor, a real estate company promoted by Sikka group availed financial facility of an amount of Rs. 130,00,00,000/- from Debenture Holder and issued Non-Convertible Debentures. The Applicant before us was appointed as trustee qua the debentures to act for the benefit of the Debenture Holders. The terms and conditions qua the debentures were recorded in Trust Deed dated 27.06.2019 as amended and restated in Debenture Trust Deed dated 30.09.2020. The brief factual narration of the facts has been given by the Applicant in the synopsis filed along with the petition.

2. Mr. Sumesh Dhawan, Ld. Counsel for the Applicant could draw our attention to Debenture Trust Deed dated 27.06.2019, as amended in terms of the amended Debenture Trust Deed dated 30.09.2020. The relevant excerpt of the Debenture Trust Deed reads thus:-

*“(A) The Company is currently engaged in the construction of a residential housing project bearing the name **"Sikka Kaamna Greens" (Company Project)** situated at Plot No. GH-03/B, Sector-143, NOIDA (admeasuring 50,000 square metres) (**Company Project Land**) allotted to the Company by NOIDA on a leasehold basis vide lease deed dated 7 July 2011 entered into between the Company and NOIDA (**Company Lease Deed**).*



- (B) *The authorised, issued, subscribed and paid-up share capital of the Company as on the Execution Date is INR 1,00,000 (Indian Rupees One Lakh only) divided into 10,000 (Ten Thousand only) equity shares of INR 10 (Indian Rupees Ten only) each.*
- (C) *The Company is an entity forming part of the Sikka Group, a partial structure chart of which, as on the Execution Date, is annexed along with this Deed as **Part A of Annexure 1** (Sikka Group Structure Chart).*
- (D) *Pursuant to a debenture trust deed dated 27 June 2019 (**Original Debenture Trust Deed**) entered into among, inter alia, the Company and Orbis Capital Limited, a public unlisted company incorporated under the Companies Act, 1956 having CIN U74991HR2006PLC036951 and registered with the Securities and Exchange Board of India as a debenture trustee under the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993 pursuant to a certificate of permanent registration no. IND000000587, and others, the Issuer has, in accordance with the Offer Letter dated June 27, 2019 issued and allotted 13,000 (Thirteen Thousand only) secured, unlisted, redeemable, freely Transferable (defined below) non- convertible debentures of a face value of INR 1,00,000 each (Indian Rupees One Lakh only) aggregating to INR 130,00,00,000 (Indian Rupees One Hundred and Thirty Crores only) (**Debentures**) on the terms and conditions set out under the Original Debenture Trust Deed (**Issue**).*
- (E) *The Company is duly empowered by its memorandum of association and articles of association to issue the Debentures, and issued the Debentures pursuant to:*
- (i) the authority granted by the resolutions of its board of directors passed at its meeting held on June 21, 2019, authorising the issuance of the Debentures; and*
 - (ii) the approval of its shareholders in terms of the resolution passed under Section 42 of the Act, read with Rule 14(2) of*



the Companies (Prospectus and Allotment of Securities) Rules, 2014 at their extraordinary general meeting held on June 27, 2019;

(F) The proceeds from the Issue were utilized by the Company in accordance with the terms of the Original Debenture Trust Deed.”

3. The provisions regarding appointment of the Applicant as Debenture Trustee are contained in Clause 2 to 4 of the Trust Deed which reads thus:-

“2. APPOINTMENT OF THE DEBENTURE TRUSTEE AND SETTLEMENT OF TRUST

2.1 Appointment of Debenture Trustee

The Company hereby appoints Orbis Trusteeship Services Private Limited to act as the debenture trustee for and on behalf of the Debenture Holders pursuant to the trust created and settled under this Deed, the Scheme, and the OFCL Board Resolution, and Orbis Trusteeship Services Private Limited agrees to act as the debenture trustee for and on behalf of the Debenture Holders in accordance with the provisions of this Deed and any other Amended and Restated Transaction Document, subject to Clause 11.10, until the Final Settlement Date. Notwithstanding anything contained herein, the Parties agree that from the Execution Date until, subject to Clause 11.10, the Final Settlement Date, the Debenture Trustee shall act for and on behalf of, for the benefit of the Subscribers or the Debenture Holders, as the case may be, and take such actions, in connection with the Amended and Restated Transaction Documents, as the Debenture Holders (by way of Majority Resolution, Special Resolution or Unanimous Resolution (as applicable)) or all of the Subscribers, as the case may be, direct.

2.2 Declaration and Settlement of Trust

(a) The Company hereby settles upon trust a sum of INR 10,000 (Indian Rupees Ten Thousand only) (Initial Contribution)



and the Debenture Trustee hereby confirms receipt of and accepts the Initial Contribution.

- (b) The Debenture Trustee hereby declares that it shall hold:*
- (i) the Initial Contribution;*
 - (ii) the benefit of all representations, warranties, covenants, undertakings made by and all other terms agreed by the Obligors and the Subordinated Creditors under the relevant Transaction Documents and the relevant Amended and Restated Transaction Documents;*
 - (iii) the Security created and maintained hereunder and under the other Transaction Documents and the Amended and Restated Transaction Documents; and*
 - (iv) all monies received by it under the Transaction Documents or the Amended and Restated Transaction Documents, including pursuant to enforcement of the Security created hereunder and under the Security Documents, the Amended Security Documents (or any part thereof) and/or the exercise of rights and remedies under the Transaction Documents (acting on the instructions of the Debenture Holders by way of Majority Resolution) or the Amended and Restated Transaction Documents (acting on the instructions of the Debenture Holders by way of Majority Resolution) save for any sums received solely for its own account in accordance with the provisions of this Deed,*

in trust for the benefit of the Debenture Holders in accordance with the provisions of the Amended and Restated Transaction Documents.

2.3 Non-Revocable Trust

Subject to Clause 11.10, the Company declares that it shall not revoke the trust hereby declared until the date of release of Security by the Debenture Trustee in accordance with Clause 31 (Covenant for Release of Security).



3. ACCEPTANCE OF TRUST BY DEBENTURE TRUSTEE

- 3.1. *The Debenture Trustee hereby declares that it shall take such actions as may be provided in this Deed for the benefit of the Debenture Holders.*
- 3.2. *For the irrevocable and unconditional discharge of the Secured Obligations by the Obligors, the Debenture Trustee shall, for the benefit of the Debenture Holders take such actions as may be required from time to time, in accordance with, or arising out of, the provisions of the Transaction Documents or the Amended and Restated Transaction Documents, to exercise its rights and perform its duties and obligations under the Transaction Documents or the Amended and Restated Transaction Documents and Applicable Law (acting on the instructions of the Debenture Holders by way of Majority Resolution, Special Resolution or Unanimous Resolution (as applicable)).*
- 3.3. *Subject to Clause 6.6 and Clause 11.10, the Debenture Trustee declares that it shall not revoke the trust hereby declared until the date of release of Security by the Debenture Trustee in accordance with Clause 3) (Covenant for Release of Security).*

4. POWERS AND OBLIGATIONS OF THE DEBENTURE TRUSTEE

- 4.1. *The Debenture Trustee hereby agrees that it shall:*
- (a) execute and deliver all other documents, agreements, instruments and certificates contemplated by this Deed or any other Transaction Document or any other Amended and Restated Transaction Document to be executed and delivered by the Debenture Trustee or as the Debenture Trustee shall deem advisable and in the best interests of the Debenture Holders (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
 - (b) execute and deliver documents as are required to be executed by the Debenture Trustee, to keep in its custody, the documents, deeds and writings in relation to the Security and*



- do any other act necessary for creation and perfection of the Security Interests under the Security Documents or the Amended and Restated Security Documents, Without prejudice to the above, the Debenture Trustee may (acting on the instructions of the Debenture Holders by way of Majority Resolution) allow any bank or other institution providing safe custody services or any professional provider of custody services to retain any of those documents in its possession;*
- (c) accept the Security until the Final Settlement Date;*
 - (d) ensure on a continuous basis that the Security is, at all times, until the Final Settlement Date, available and adequate to discharge the Secured Obligations,*
 - (e) enforce the Security Interests created under the Security Documents and any other rights accruing to the Debenture Holders upon occurrence of an Event of Default or otherwise, in accordance with the provisions of the Transaction Documents, the Amended and Restated Transaction Documents, and Applicable Law and to receive and disburse all monies received from such enforcement in accordance with the relevant Transaction Documents and the Amended and Restated Transaction Documents;*
 - (f) monitor and require, from time to time, compliance by the Obligors and Subordinated Creditors with the terms, conditions and covenants contained in the Transaction Documents and the Amended and Restated Transaction Documents, and apprise the Debenture Holders of any non-compliance by the Obligors and/or the Subordinated Creditors, with respect to the Transaction Documents or the Amended and Restated Transaction Documents within 1 (One) Business Day of becoming aware of such non-compliance;*
 - (g) inspect the statutory registers of the Company and to take copies and extracts in the course of such inspection;*



- (h) *until the occurrence of an Event of Default, act as the authorised signatory of each of the Escrow Accounts in addition to and jointly with authorised representative(s) of the Company, GPPL and NBPL respectively, and deal with the monies lying to the credit of the Escrow Accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed and the Amended and Restated Escrow Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
- (i) *upon the occurrence of an Event of Default, promptly issue necessary instructions to the Account Bank in accordance with the Amended and Restated Escrow Agreement intimating the Account Bank of such occurrence and requiring the Account Bank to appoint it as the sole authorised signatory of the Escrow Accounts, and deal with the monies lying to the credit of the Escrow Accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed and the Amended and Restated Escrow Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
- (j) *until the occurrence of an Event of Default, act as the authorised signatory of each of the IndusInd Debenture Trustee Escrow Accounts, and deal with the monies lying to the credit of the IndusInd Debenture Trustee Escrow Accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed and the Amended and Restated IndusInd Escrow Account Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
- (k) *upon the occurrence of an Event of Default, promptly issue necessary instructions to IndusInd Bank in accordance with the IndusInd Escrow Account Agreement or the Amended and Restated IndusInd Escrow Account Agreement and Applicable Law intimating IndusInd Bank of such occurrence and*



requiring IndusInd Bank to appoint it or its nominee (including an existing key managerial personnel of the Company, GPPL, or NBPL, as the case may be) as the sole authorised signatory of the IndusInd Escrow Accounts, and deal with the monies lying to the credit of the IndusInd Escrow Accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed, Applicable Law, IndusInd Escrow Account Agreement or the Amended and Restated IndusInd Escrow Account Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);

- (l) upon the occurrence of an Event of Default, promptly issue necessary instructions to the Account Bank in accordance with the Trust and Retention Account Agreement or the Amended and Restated Trust and Retention Account Agreement intimating the Account Bank of such occurrence and requiring the Account Bank to appoint it as the sole authorised signatory of the accounts established and maintained pursuant to the Trust and Retention Account Agreement and the Amended and Restated Trust and Retention Account Agreement, and deal with the monies lying to the credit of such accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed, the Trust and Retention Account Agreement, and the Amended and Restated Trust and Retention Account Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
- (m) communicate to the Debenture Holders all information provided by the Obligors and/or Subordinated Creditors pursuant to Part A (Information Covenants) of **Schedule 8** (Information, Financial and Negative Covenants) hereof within 2 (two) Business Days of receipt of such information from the Obligors and/or the Subordinated Creditors, as the case may be, in accordance with the timelines prescribed for each such covenant;*



- (n) refrain from any acts and avoid any omissions which might prejudice the value or the validity of the rights and the Security constituted under the Transaction Documents or the Amended and Restated Transaction Documents;*
- (o) perform all such acts, deeds and things which the Debenture Trustee may from time to time deem necessary or appropriate for or incidental to the management and administration of the rights vested in it as the Debenture Trustee, pursuant to or in connection with the Transaction Documents (including, without limitation, executing any amendments or re-statements or re-executing the Transaction Documents) or the Amended and Restated Transaction Documents (including, without limitation, executing any amendments or re-statements or re-executing the Amended and Restated Transaction Documents); and*
- (p) subject to the terms and provisions of this Deed, take such other action in connection with the foregoing as the Debenture Holders may from time to time direct by way of Majority Resolution.*

Provided that, before initiating any action or exercising any right or performing any duty or incurring or imposing any obligations under this Deed or any other Transaction Document or any other Amended and Restated Transaction Document, including approving any form of payment from any of the Escrow Accounts or the IndusInd Escrow Accounts, the Debenture Trustee shall seek prior written instructions from the Debenture Holders by way of Majority Resolution, Special Resolution or Unanimous Resolution (as applicable) and only upon receipt of such instructions shall the Debenture Trustee exercise its rights and perform its duties in accordance with such instructions. In the event that no threshold (i.e. whether an action requires a Majority Resolution, Special Resolution or Unanimous Resolution) has been set for initiating any action or exercising any right or performing



any duty under this Deed or any other agreement, the Debenture Trustee should seek instructions from the Debenture Holders by way of Majority Resolution.

- 4.2. *The powers conferred by each of the Transaction Documents and each of the Amended and Restated Transaction Documents in favour of the Debenture Trustee are cumulative and without prejudice to its respective powers under Applicable Law, equity or under any other Transaction Document or any other Amended and Restated Transaction Document. Subject to Clauses 4.1, the duties and powers of the Debenture Trustee listed above may be performed or exercised as often as the Debenture Trustee deems fit, and the Debenture Trustee may, in connection with the exercise of its powers, join or concur with any Person in any transaction, scheme or arrangement, and the Company acknowledges that the respective powers of the Debenture Trustee shall, in no circumstances, be suspended, waived or otherwise prejudiced by anything.*
- 4.3. *For the avoidance of doubt, the Debenture Trustee shall, before granting any waiver under this Deed or any other Transaction Document or any other Amended and Restated Transaction Document, seek prior approval from the Debenture Holders by way of a Majority Resolution.*
- 4.4. *The Debenture Trustee may act through its personnel and employees and may, with prior approval from the Debenture Holders by way of a Majority Resolution, delegate by power of attorney or otherwise to any Person(s) (whether being a joint trustee or not) all or any of the trusts, powers and authorities vested in it by this Deed, any Transaction Document, any Amended and Restated Transaction Document or any document relating to any of them and such delegation may be made upon such terms and subject to such conditions and subject to such regulations as the Debenture Holders think fit after having due regard to the nature of trusts, powers or authorisations it proposes to delegate,”*



4. The principal and purpose for issuance of NCD mentioned in Clause 5 of the deed and the conditions to subscriptions are enumerated in Clause 5 of the deed and the conditions to subscriptions are enumerated in Clause 6 thereof. The conditions subsequent are given in Part-8 of the deed. Clause 5 to 8 of the deed reads thus:-

“5. ORIGINAL PRINCIPAL AND PURPOSE

5.1. Original Principal

The Debentures constituted and issued under the terms of the Original Debenture Trust Deed and the Offer Letter are secured, unlisted, redeemable, freely Transferable non-convertible debentures of a face value of INR 1,00,000 (Indian Rupees One Lakh only) each, aggregating to INR 130,00,00,000 (Indian Rupees One Hundred and Thirty Crores only), issued on a private placement basis, in dematerialized form.

5.2. Purpose

*The entire Original Principal has been utilised/ shall be utilised by the Company for the following purposes (collectively, the "**Purpose**"):*

- (a) for paying the IndusInd Outstanding Amount to IndusInd Bank as full repayment and settlement of the IndusInd Facility, including any interests, Taxes or charges applicable thereto, on the Deemed Date of Allotment;*
- (b) for paying the Processing Fee to the Subscriber(s) on the Deemed Date of Allotment;*
- (c) for paying the Company Reschedulement Application Amount or such other amount as may be approved by the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution) to NOIDA on the Deemed Date of Allotment along with submission of the Company Reschedulement Application;*



- (d) *for paying the NBPL. Reschedulement Application Amount to NOIDA, for and on behalf of NBPL, along with submission of the NBPL. Reschedulement Application by NBPL, subject to prior approval from the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution);*
- (e) *for paying the Company Reschedulement Amount and NBPL Reschedulement Amount (net of the Company Reschedulement Application Amount and NBPL Reschedulement Application Amount, respectively) to NOIDA immediately upon receipt of and in accordance with the Reschedulement Approval; and*
- (f) *any balance thereof for paying the expenses incurred, being incurred or to be incurred with respect to construction of Phase I and Phase II.*

It is clarified that, any collection/remittance charges in connection with the Original Principal being received by the Company in the Company Escrow Account shall be borne entirely by the Company. It is further clarified that the Company shall not (a) utilise the Original Principal or any part thereof for construction of Phase III or Phase IV, or (b) permit utilisation of the Original Principal or any part thereof for any purpose other than those expressly set out in this Clause 5.2 (Purpose) unless otherwise approved by the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution).

6. CONDITIONS TO SUBSCRIPTION

- 6.1. *Subscription to the Issue by the Subscribers is subject to fulfilment of each of the requirements set out in Schedule 6 (Conditions Precedent) (**Conditions Precedent**) in form and substance satisfactory to the Debenture Trustee (acting on the instructions of all of the Subscribers).*



- 6.2. *The Obligors shall procure that each of the Conditions Precedent is fulfilled by the relevant Obligor no later than within 7 (seven) Business Days from June 27, 2019 (**Long Stop Date**).*
- 6.3. *Upon satisfaction of all of the Conditions Precedent, the Company shall issue a written notice to the Debenture Trustee (**CP Satisfaction Notice**) of the satisfaction of such requirements, in the form set out in Part B (Format of CP Satisfaction Notice) of Schedule 3 (Formats).*
- 6.4. *If the Debenture Trustee (acting on the instructions of all of the Subscribers) is not satisfied with the fulfilment of any of the Conditions Precedent, it shall provide written notice thereof to the Company and the Company may re-send the notice under Clause 6.3 above after complying with such requirements within 2 (Two) Business Days (or such further time as may be approved by the Debenture Trustee (acting on the instructions of all of the Subscribers)) of receiving such notice.*
- 6.5. *Each of the Obligors and the Subordinated Creditors hereby covenants and undertakes to take all actions and exercise all rights and powers available to it to give full effect to the provisions of the Transaction Documents, including its obligations under or with respect to any Transaction Documents.*
- 6.6. *If:*
- (a) at any time on or after the Execution Date and prior to the Closing Date:*
 - (i) any Change in Shareholding occurs;*
 - (ii) the Company, GPPL and/or NBPL cease to have any right, title or interest in (or part thereof) or peaceful possession of the Company Project Land, GPPL, Project Land or the NBPL Project Land, as the case may be, or any part thereof;*



- (iii) *any of the Obligors or the Subordinated Creditors are in breach of the terms of the Original Debenture Trust Deed or any other Transaction Document; or*
 - (iv) *any insolvency resolution proceedings are initiated against any of the Obligors or Subordinated Creditors under the IBC, whether by IndusInd Bank or any other third party;*
 - (v) *any litigation is commenced, threatened or continuing against any Obligor or Subordinated Creditors that in the sole opinion of the Debenture Trustee (acting on the instructions of all of the Subscribers) leads to or could potentially lead to a Material Adverse Effect, save for the proceedings listed out in **Annexure 3** (Litigation Proceedings in relation to the Company) to this Deed; or*
 - (vi) *any Material Adverse Effect occurs; or*
- (b) *any of the Conditions Precedent are not satisfied or waived by the Debenture Trustee (acting on the instructions of all of the Subscribers) within the Long Stop Date,*
- the Debenture Trustee (acting on the instructions of all of the Subscribers) may, by notice to the Company, terminate this Deed without prejudice to the Subscribers' rights with respect to such breach or a prior breach of the terms of this Deed by any of the Obligors.*

7. SUBSCRIPTION

- 7.1. *Subject to Clause 6.4 and Clause 6.6, Closing shall occur within 7 (seven) Business Days from the date of receipt of the CP Satisfaction Notice by the Debenture Trustee (**Closing Commencement Date**).*
- 7.2. *On and from the Closing Commencement Date, the Parties shall observe and perform their respective obligations set out in Schedule 2 (Closing Actions) in the sequence set out therein. The Parties agree to take all reasonable measures required to ensure*



that all the events contemplated in Schedule 2 (Closing Actions) are completed on the Closing Commencement Date or within 3 (Three) Business Days thereafter or such longer period as the Debenture Trustee may approve (acting on the instruction of all of the Subscribers). All actions referred to in Schedule 2 (Closing Actions) shall be, and shall be deemed to be, consummated simultaneously and no actions shall be deemed to have been taken nor documents executed or delivered and no agreements and/or deeds and/or documents shall be deemed to have come into effect until all have been taken, executed, delivered and have come into effect (except the Security Documents, each of which shall have come into effect from the Reference Date and shall continue to remain in effect until the Final Settlement Date).

8. CONDITIONS SUBSEQUENT

8.1. *Upon Closing, the Company shall, unless otherwise approved by the Debenture Trustee in writing (acting on the instructions of the Debenture Holders by way of Majority Resolution):*

(a) within 5 (five) calendar days from the Reference Date, obtain insurance coverage of adequate value from financially sound and reputed insurers satisfactory to the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution), with respect to each of the Projects, with the Debenture Trustee as the loss payee under each of those insurance policies;

(b) within 7 (seven) calendar days from the Reference Date:

(i) ensure that the Debentures are credited into the demat account(s) of the Subscriber(s);

(ii) along with GPPL and NBPL, close each of the Existing Accounts and transfer of all monies lying to the credit of each of the Existing Accounts (as set out in Annexure 2 (List of Existing Accounts)) to the respective Escrow Accounts;

- (iii) obtain the Reschedulement Approval with respect to Company's NOIDA Outstanding Dues;
 - (iv) along with GPPI., issue notices to all the existing customers of the Company Project and the GPPL Project specifying the details of the Company Escrow Account and the GPPL Escrow Account and notifying the customers that any payments in relation to the Units allotted to such customers should henceforth be made into the Company Escrow Account or the GPPL Escrow Account, as the case may be;
 - (v) amend the standard Unit allotment documents for the potential customers of the Company Project and the GPPI. Project in a form acceptable to the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution);
 - (c) within 15 (fifteen) calendar days from the Reference Date, along with GPPL and NBPL, notify UP RERA of the closure of the Existing Accounts and setting up of the Escrow Accounts for its records;
 - (d) within 30 (thirty) calendar days from the Reference Date:
 - (i) implement and fulfil the terms and conditions set out in the Reschedulement Approval and obtain NOIDA's approval for creating Security Interest over the Company Project Land;
 - (ii) obtain approval from NOIDA for extending the time period for construction of the Company Project along with the building plan and commencement certificate;
 - (iii) obtain approval from UP RERA for extending the period of registration of the Company Project;
 - (iv) along with all the Pledgors, complete the process of dematerialisation of all the Pledged Shares (other than the shares of the Company which shall be in dematerialised



form prior to the Closing Commencement Date) in a form and manner acceptable to the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution) and deliver to the Debenture Trustee copies of the Pledge Forms and Pledge Reports submitted to the Depository and the intimation received from the Depository confirming (i) the creation and the noting of the pledge over all of the Pledged Shares held by them in favour of the Debenture Trustee (for the benefit of the Secured Parties); and (ii) the transfer of all of the Pledged Shares held by them from the "free balances" to the "pledged balances" of their respective demat accounts;

and

(e) within 90 (ninety) calendar days from Reference Date:

(i) take all actions and exercise all rights and powers available to it under Applicable Law and consent of the relevant allottees:

*(A) to allot fresh unsold Units in Phase I and Phase II to all allottees of sold Units in Phase III and Phase IV as on the Execution Date against the sold Units allotted to such allottees in Phase III and Phase IV **(Unit Swap)**; and*

(B) make appropriate changes in its books of accounts to record the Unit Swap, subject to prior approval of the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution);

and

(ii) obtain all relevant licenses/approvals required to be obtained by it with respect to the Company Project revised by the relevant Governmental Authority to reflect the correct Company Project Land specifications,



and provide documentary evidence of having complied with each of the above covenants (within the time period prescribed for the respective covenants) to the Debenture Trustee in form and substance satisfactory to the Debenture Trustee (acting on the instructions of the Debenture Holders by way of Majority Resolution).

8.2 NBPL Reschedulement

(a) Within 30 (Thirty) calendar days from the Reference Date, NBPL shall deliver to the Debenture Trustee a certified true copy of the letter received from NOIDA confirming the NBPL Reschedulement Application Amount.

(b) Upon receipt of the letter mentioned in Clause 8.2(a):

(i) NBPL shall convene and conduct a meeting of its board of directors to approve the submission of the NBPL Reschedulement Application along with the NBPL Reschedulement Application Amount to NOIDA and record the payment of the NBPL Reschedulement Application Amount to NOIDA by the Company on behalf of NBPL;

(ii) the Company, subject to receipt of Debenture Trustee's prior approval (acting on the instructions of the Debenture Holders by way of Majority Resolution), pay the NBPL Reschedulement Application Amount to NOIDA on behalf of NBPL in accordance with the provisions of this Deed and the Escrow Agreement; and

(iii) NBPL shall submit the NBPL Reschedulement Application with NOIDA and provide a duly acknowledged copy of the NBPL Reschedulement Application to the Debenture Trustee.

(c) Upon receipt of the Reschedulement Approval with respect to NBPL's NOIDA Outstanding Dues, NBPL shall forthwith implement and fulfil the terms and conditions set out in the Reschedulement Approval and obtain NOIDA's approval for creating Security Interest over the NBPL Project Land.



8.3 Within 60 (Sixty) calendar days from the Reference Date, (a) GPPL shall obtain and provide to the Debenture Trustee a duly acknowledged copy of NOIDA's approval for creating Security Interest over the GPPL Project Land, and (b) the Debenture Trustee shall duly date and execute all Mortgage Documents in respect of the GPPL. Project Land required for creating and perfecting such Security Interest over the GPPL Project Land.”

5. The repayment plan qua the debenture consideration has been given in schedule to debenture deed (Annexure A-4). Though the schedule has been mentioned in the synopsis given by the Applicant. Nevertheless, even at the cost of repetition, the Annexure-4 to the Debenture Deed is reproduced thus:-

ANNEXURE 4

DEBENTURE PAYABLES

S. No.	Payment Date	Outstanding Principal Payment (in INR)	Coupon Payment (in INR)	Total Repayment (in INR)
1.	First Coupon Payment Date i.e. 30 June 2020	-	30,95,00,000	30,95,00,000
2.	30 September 2020	32,50,00,000	7,45,00,000	39,95,00,000
3.	31 December 2020	32,50,00,000	5,52,00,000	38,02,00,000
4.	31 March 2021	32,50,00,000	3,64,00,000	36,14,00,000
5.	30 June 2021	32,50,00,000	1,86,00,000	34,36,00,000

6. During the course of hearing, Mr. Sumesh Dhawan, Ld. Counsel for the Applicant fairly submitted that though the amount payable by the Principal Borrower to redeem the non-convertible debenture on 30.06.2020, 30.09.2020 and 31.12.2020 is covered by the period mentioned in Section 10A of IBC, 2016, but regarding the amount payable on 31.03.2021 & 30.06.2021, apparently there is default committed by the Principal Borrower i.e. Respondent before us. He further submitted that on 08.11.2021, the Respondent returned an amount of Rs. 2,60,85,407/- and on 15.03.2022 it



repaid an amount of Rs. 11,80,000/-, but the repayment of these amounts does not reduce or mitigate the default committed by the Corporate Debtor.

7. To espouse the disbursement an amount of consideration paid for non-convertible debentures, Mr. Sumesh Dhawan Ld. Counsel made reference to page No. 1370 of the paper book. It is a certificate issued by Axis Bank regarding disbursement of amount of Rs. 130,00,00,000/- to the Corporate Debtor/Respondent from the account of Debenture Holder. The certificate reads thus:-

EXHIBIT 21(COLLY) 1370

AXIS BANK
Date: 03/06/2022

To
Asia Pragati Strategic Investment Fund
811 8TH FLOOR ANSAL BHAWAN 16 KG MARG
NEW DELHI-110001

Sub: Payment Confirmation Certificate for Account no : 919020042107809

Dear Sir/Madam,

This is to confirm that the below mentioned amounts have been disbursed from Account no. 918020102540615 to the Account no. 919020042107809 of the beneficiary:

Sr No	Date	Details/Particulars	Reference No. (If any)	Beneficiary Name	Beneficiary A/C No.	Amount (INR)
1	01/07/2019	ASIA PRAGATI STRATEGIC INVESTMENT FUND	M729342	KINDLE INFRAHEIGHTS PRIVATE LIMITED-ESCROW A/C	919020042107809	1,30,00,00,000.00
2	09/03/2021	TRF/ASIA PRAGATI STRATEGIC INVESTMENT FUND	SS8891370	KINDLE INFRAHEIGHTS PRIVATE LIMITED-ESCROW A/C	919020042107809	6,00,00,000.00

8. It is not even the case of the Respondent that no amount is payable by it to the Applicant and there is no default on its part. During the course of hearing Mr. Gaurav Mitra, Ld. Counsel for the Respondent fairly submitted that the amount is payable and the CD is prepared to repay the principal amount, though not instantly but over a period of time. During the course of the hearing, Mr. Sumesh Dhawan, Ld. Counsel also made reference to the



various other documents such as Debenture Trust Deed dated 25.02.2021, statement of computation of the amount claimed to be default of Corporate Guarantee issued by the Corporate Guarantor, Memorandum Of Entry Recording Mortgage by Deposit of Title Deeds dated 03.10.2019 executed by the Kindle Infraheights Private Limited i.e. the Corporate Debtor before us in favour of erstwhile Debenture Trust Deed i.e. Orbis Capital Limited, Unattested Memorandum of Hypothecation executed by Corporate Debtor, G.S. Promoters Private Limited, Nobal Buildtech Private Limited and Orbis Capital Limited. He also made reference to Unattested Share-Pledge Agreement dated 28.06.2019 executed by the Corporate Guarantor and the Personal Guarantor. He could also sought to give reference of the Deed of Personal Guarantee dated 28.06.2019 executed by the Personal Guarantors.

9. Nevertheless, for the purpose of taking a decision regarding admission or rejection of the application preferred under Section 7(1) & (2) of IBC, 2016, what we need to satisfy us about is the disbursement of amount of debt, default in repayment of the amount of debt and the application being complete. We may also satisfy ourselves regarding non-pendency of legal proceedings against the IP proposed by the Principal Borrower to be appointed as IRP. The consent given by IP in the prescribed form i.e. Form-2 is placed on record as Exhibit-29 at page No. 1468. The declaration given by the IP regarding non-pendency any legal proceedings against it is available at page No. 1468 of the petition which reads thus:-



FORM 2
(See sub-rule (1) of rule 9)

(Under rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

WRITTEN COMMUNICATION BY PROPOSED INTERIM RESOLUTION PROFESSIONAL

3rd June, 2022

To,
The National Company Law Tribunal
Block No. 3, Ground Floor,
6th, 7th & 8th Floor, CGO
Complex, Lodhi Road,
New Delhi-110003

From,
Mr. Hemant Sethi
Block IB, House no. 8-C,
Ashok Vihar, Phase-1, Delhi-110052

In the matter of **Kindle Infraheights Private Limited**

Subject: Written communication in connection with an application to initiate corporate insolvency resolution process in respect of **Kindle Infraheights Private Limited** having registered address is C- 60, Vikas Marg, Preet Vihar, Delhi-110092 IN

Madam/Sir,

I, Hemant Sethi, an insolvency professional registered with Insolvency and Bankruptcy Board of India and a professional members of ICSI Institute of Insolvency Professionals having registered number IBB/IPA-002/IP-N01107/2021-2022/13628 have been proposed as the interim resolution professional by **Orbis Trusteeship Services Private Limited (Financial Creditor)** in connection with the proposed corporate insolvency resolution process of **Kindle Infraheights Private Limited (Corporate Debtor)**.

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, I hereby:

- agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;
- state that the registration number allotted to me by the Board is IBB/IPA-002/IP-N01107/2021-2022/13628 and that I am currently qualified to practice as an insolvency professional;
- state that I hold a valid Authorization for Assignment (AFA) issued to me by ICSI Institute of Insolvency Professionals, which is valid upto 09.05.2023.
- that I am currently having the following assignments in hand:

Sl. No.	Assignment as	Number of Assignment(s)	No.	Name of corporate debtor	Date of commencement of process	Expected date of closure of process
Corporate Processes						
1	IRP		1	NIL		
2	RP		1	Emkay Automobiles Industries Limited	12.10.2021	10.07.2022
3	Liquidator (including voluntary liquidations)		1	NIL		
4	Authorised Representative		1	NIL		
Individual Processes						
5	Resolution Professional	-				
6	Bankruptcy Trustee	-				
7	Any other.	-				

- certify that there are no disciplinary proceedings pending against me with the Board or with ICSI Institute of Insolvency Professionals.
- affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;
- make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016:- Not Applicable.



HEMANT SETHI
Insolvency Professional
IBBI/IPA-002/IP-N01107/2021-2022/13628



10. The disbursement of consideration for non-convertible debenture is established from the certificate issued by the Axis Bank. The issuance of NCD by the Respondent to Debenture Holder is established from the aforementioned deed of DTD i.e. deed of Debenture Trust Deed. The Annexure-4 to the DTD reflects the dates on which the Respondent/Principal Borrower/CD committed a default in repayment of the amount of debt.

11. Mr. Gaurav Mitra, Ld. Counsel for the Respondent/CD entered appearance and submitted that in terms of the provisions of DTD, the Applicant hereinbefore us is not authorised to institute the present application. For the purpose he makes reference to Clause 4.1 (h) of the deed and espoused that the Debenture Trustee could act on behalf of the Debenture Holders only on specific authorisation. For the purpose he also made reference to proviso given in the deed below Clause 4.1 (m). The sub-clause (h) and proviso below sub-clause (m) of Clause 4.1 of the DTD dated 27.06.2019 reads thus:-

“4. POWERS AND OBLIGATIONS OF THE DEBENTURE TRUSTEE

4.1. The Debenture Trustee hereby agrees that it shall:

.....

(h) until the occurrence of an Event of Default, act as the authorised signatory of each of the Escrow Accounts in addition to and jointly with authorised representative(s) of the Company, GPPL and NBPL respectively, and deal with the monies lying to the credit of the Escrow Accounts for and on behalf of the Debenture Holders in accordance with the provisions of this Deed and the Escrow Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution);

.....

(m)



Provided that, before initiating any action or exercising any right or performing any duty or incurring or imposing any obligations under this Deed or any other Transaction Document including approving any form of payment from any of the Escrow Accounts, the Debenture Trustee shall seek prior written instructions from the Debenture Holders by way of Majority Resolution, Special Resolution (as applicable) and only upon receipt of such instructions shall the Debenture Trustee exercise its rights and perform its duties in accordance with such instructions. In the event that no threshold (i.e. whether an action requires a Majority Resolution, Special Resolution or Unanimous Resolution) has been set for initiating any action or exercising any right or performing any duty under this Deed or any other agreement, the Debenture Trustee should seek instructions from the Debenture Holders by way of Majority Resolution.”

12. Mr. Gaurav Mitra, Ld. Counsel also read out Clause 4.2 of the DTD again to say that the present application has been preferred by the Applicant without there being any authorisation for the purpose. He could also draw our attention to the Exhibit-26 to the application (page No. 1424) and submitted that the letter of authorisation as enclosed to the application is general letter and not for any specific purpose to prefer the present application. He also placed reliance upon the judgment of Hon'ble Supreme Court in **State Bank Of Travancore vs. M/s Kingston Computers(I) P.Ltd** (Civil Appeal No. 2014 of 2011) and Hon'ble NCLAT in **M/s IDBI Capital Markets & Securities Ltd. Vs. M/s JBF Petrochemicals Ltd.** only to buttress his submission that there being no proper authorisation in favour of the Applicant, the application is incomplete and deserve to be rejected on this ground alone. The relevant excerpt of the judgment referred to in the written synopsis filed on behalf of the Corporate Debtor reads thus:-



“14....

.....In our view, the judgment under challenge is liable to be set aside because the respondent had not produced any evidence to prove that Shri Ashok K. Shukla was appointed as a Director of the company and a resolution was passed by the Board of Directors of the company to file suit against the appellant and authorised Shri Ashok K. Shukla to do so. The letter of authority issued by Shri Raj K. Shukla, who described himself as the Chief Executive Officer of the company, was nothing but a scrap of paper because no resolution was passed by the Board of Directors delegating its powers to Shri Raj K. Shukla to authorise another person to file suit on behalf of the company.”

X X X

“70. Suffice is for this Tribunal to pertinently point out that the Power of Attorney Holder is the Agent of the Guarantor and in respect of an authorisation of a company, the same will mean a specific authorisation by the Board of Directors of the Company through a Resolution being passed as per decision of the Hon'ble Supreme Court in *State Bank of Travancore V. Kingston Computer India Fyi Ltd.* reported in *MANU/SC/0280/2011: (2011) 11 SCC 524.*”

13. Finally, Mr. Gaurav Mitra, Ld. Counsel argued that the Applicant before us is not the Financial Creditor and could not have preferred the present application. He also questioned the particulars of the Debenture Trustee. However, immediately he could give up his plea regarding the identity of the Applicant, as in terms of deed dated 30.09.2020, the deed dated 27.06.2019 was modified. As far as the reliance by Mr. Gaurav Mitra, Ld. Counsel on Clause 4.1 (h) of the DTD is concerned, it provides that until the occurrence of an event of default the Debenture Trustee would act as the authorised signatory of each of the Escrow Account in addition to and jointly with Authorised Representatives of the company, GPPL and NBPL respectively, and deal with the monies lying to the credit of the Escrow Accounts for and on



behalf of the Debenture Holders in accordance with the provisions of the deed and Escrow Agreement (acting on the instructions of the Debenture Holders by way of Majority Resolution). A reading of the Clause clearly indicates that the intent of the same is to provide guideline regarding the affairs in respect of debentures and the escrow account and not regarding filing of an application by the Financial Creditor before this Tribunal.

14. Similarly, a reading of proviso below sub-clause (m) of Clause 4.1 indicate that the debenture trustee needed to be authorised by the debenture holders before initiating any action or exercising any right or performing any duty or incurring or imposing any obligation under the deed or any other transaction document including approving any form of payment from any of the escrow account. The proviso further provides that the debenture trustee shall seek prior written instructions from the Debenture Holder by way of majority resolution for the aforementioned purposes. The proviso further provides that the special resolution or unanimous resolution as applicable and only upon receipts of such instruction shall the debenture trustee exercise its right and perform its duties in accordance with instruction. The proviso does not provide for any condition regarding filing of an application under Section 7(1) & (2) of IBC, 2016. As can be seen from MCA notification viz. S.O. 1091(E) dated 27.02.2019, the Central Government has notified a trustee (including a Debenture Trustee) may file an application for initiating Corporate Insolvency Resolution Process against the Corporate Debtor before this Tribunal. The notification could be relied upon by Hon'ble NCLAT in order passed **Orbis Trusteeship Services Pvt. Ltd. vs. Nobal Buildtech Pvt. Ltd.** in Company Appeal (AT) (Insolvency) No. 1071 of 2022 i.e. in the case of



Corporate Guarantor qua the Respondent before us. The brief judgment of Hon'ble NCLAT reads thus:-

"27.03.2023 *This appeal is directed against the order dated 02.06.2022 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench) in (I.B.) 143 (ND)/2022 by which an application filed under Section 7 by the Appellant (Orbis Trusteeship Service Pvt. Ltd.) as a Debenture Trustee on behalf of the Debenture Holders, for the Resolution of a debt of Rs. 255,07,26,925/- as on 02.02.2020 against Nobal Buildtech Private Ltd. (Corporate Debtor) has been dismissed on the ground that the application filed at the instance of the Appellant was not maintainable as the amount was not disbursed by the Appellant but by the Debenture Holders.*

2. *Senior Counsel for the Appellant has drawn our attention to Form-1 (available at Pg. 913, Volume-V) in which it is averred that Asia Pragati Strategic Investment Fund is the Debenture Holder, Nobal Buildtech Private Limited is the Corporate Debtor and Kindle Infraheights Pvt. Ltd. had issued the debentures. The Appellant is the Debenture Trustee for the benefit of the Debenture Holders.*

3. *Since the issue involved in this case is in a very narrow compass that is as to whether the application under Section 7, preferred at the instance of the Appellant being the Debenture Trustee is maintainable or not, Counsel for the Appellant has drawn our attention to a notification dated 27.02.2019 issued by the Ministry of Corporate Affairs as per which the Trustee (including Debenture Trustee) can file an application on behalf of the Financial Creditor. The said notification is reproduced as under:-*

**"MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 27th February, 2019**

S.O. 1091(E)- *In exercise of the powers conferred by sub-section (1) of section 7 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the financial creditor:-*



(i) a guardian;

(ii) an executor or administrator of an estate of a financial creditor,

(iii) a trustee (including a debenture trustee); and

(v) a person duly authorised by the Board of Directors of a Company.

[F. No. 30/25/2018-Insolvency Section]

GYANESHWAR KUMAR SINGH, Jt. Secy."

4. Counsel for the Respondent has been fair enough to concede about the existence of the aforesaid notification.

5. Thus, in view of the aforesaid facts and circumstances, the issue is no more res-integra because of the notification dated 27.02.2019.

6. In view of the aforesaid facts and circumstances the present appeal is thus allowed. The 'impugned order' is set aside. The matter is remanded back to the 'Adjudicating Authority' to decide the case on merits. The parties are directed to appear before the 'Tribunal' on **1st May, 2023**.

7. It is needless to mention that the Tribunal shall to decide the matter between the parties expeditiously."

15. Though from the aforementioned judgment it is clear that the Debenture Trustee has statutory authority to institute proceedings against on behalf of the Debenture Holders but in the present case, the Ld. Counsel for the Applicant could draw our attention to Exhibit-26 which is a general Authorisation Letter on behalf of the Debenture Holder, giving authority to Applicant to act on its behalf. The letter reads thus:-

ASIA PRAGATI

Asia Pragati Strategic Investment Fund
811, 8th Floor, Ansal Bhawan, 16 K.G. Marg,
New Delhi - 110001
contact@asiapragati.com

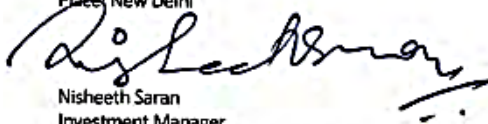
LETTER OF AUTHORISATION

By this document, it is hereby acknowledged, that I/ We the undersigned ("Client"), do hereby grant specific authorisation to Orbis Trusteeship Services Private Limited, its representatives and permitted assigns ("Orbis"), for purposes listed herewith in this letter of authorisation ("Authorisation"):



- A. This Authorisation is granted to Orbis, in its capacity as the acting representative of the Debenture Holders under: (i) the original terms of the Transaction Documents and as restated and amended subsequently, in relation to the Secured Obligations of the Issuer created under the terms of the Debenture Trust Deed, first dated 27 June 2019, and amended and restated on 30 September 2020, towards the Issuance of Debentures ("Issue 1"); and (ii) the terms of the Transaction Documents in relation to the Secured Obligations of the Issuer created under the terms of the Debenture Trust Deed dated 25 February 2021, towards the second and additional Issuance of Debentures ("Issue 2").
- B. Orbis shall have the authority to discuss, execute, issue, release and obtain, any note, notice, letter or such other document as may be specifically required by the Client in writing, including towards enforcing Security under Issue 1 and Issue 2, in accordance with the terms of their respective Transaction Documents and invoking respective Guarantees under IBC and Applicable Laws, with the Issuer and such other persons as may be directed and agreed in writing by the Client.
- C. Orbis shall further have the authority to disclose information pertaining to Issue 1 and Issue 2, including in relation to the Debentures, Security, Dispute, Event of Default under the terms of their respective Transaction Documents and such other information pertaining to the Issue, and share copies of documents, including the Transaction Documents, to the extent necessary and as agreed in writing by the Client.
- D. Orbis shall have the authority to contact, make submissions and applications to relevant regulatory/statutory/ governmental authorities with the necessary information, as may be required to carry out and perform specific authorities granted herein, in consultation with the Client.
- E. This authority shall also include any incidental acts that are reasonably required by Orbis to carry out and perform the specific authorities granted herein, in consultation with the Client.
- F. Further, Orbis shall have the authority to discuss and disclose Information pertaining to the Escrow Account, account with IndusInd Bank and such other facility Information pertaining to the Debentures under Issue 1 and Issue 2, to the extent necessary and as agreed in writing by the Client.
- G. This authority is in addition to any authority granted to Orbis under the terms of the respective Transaction Documents and does not limit any right available to it under its terms.
- H. Capitalised terms used herein and not otherwise defined shall have the meanings given to them under the respective Transaction Documents.

Date: 22/10/2021
Place: New Delhi


Nisheet Saran
Investment Manager
Asia Pragati Strategic Investment Fund

16. In the wake of the aforementioned, we are not convinced with the plea raised on behalf of the Corporate Debtor that the Applicant has no locus to prefer the present application.

17. Having drawn our attention to Exhibit-34 to Rejoinder i.e Escrow Account Agreement, the Ld. Counsel for the Corporate Debtor submitted that since in terms of Clause 3.2 of the Agreement, it was the Applicant i.e. Debenture Trustee who was operating the escrow account, the default occurred in redeeming non-convertible debentures cannot be attributed to the Respondent/CD. The Clause 3.2 relied upon by him reads thus:-

“3.2 Operation of the Escrow Accounts

(a) Each of KIPL, GPPL, and NBPL hereby unconditionally and irrevocably delegates to the Escrow Agent the authority to



operate the Escrow Accounts in accordance with the terms of this Agreement, Applicable Law, and in accordance with the instructions of the Debenture Trustee (acting at all times in accordance with the Transaction Documents). It is hereby clarified that each of the RERA Designated Accounts shall be operated in accordance with the terms of this Agreement and the RERA Act. Save as provided for in this Agreement and in the RERA Act no Person shall be entitled to issue instructions in relation to any of the RERA Designated Accounts.

- (b) All transfers from the Escrow Accounts shall be made by the Escrow Agent in India only and the Escrow Agent is not permitted to make any transfers from the Escrow Account in any other jurisdiction, unless such transfer to another jurisdiction is permitted by Applicable Law. Notwithstanding anything contained in this Agreement, in the event any instruction or directions received by the Escrow Agent from the Uttar Pradesh Real Estate Regulatory Authority pertaining to any of the RERA Designated Accounts, such instruction or direction issued by the Uttar Pradesh Real Estate Regulatory Authority shall prevail over any conflicting instructions provided by the Promoter. The Escrow Agent shall promptly, a having received any such instruction or direction from the Uttar Pradesh Real Estate Regulatory Authority, inform the Debenture Trustee and the Promoter of such instruction or direction.*
- (c) The Promoters shall only be entitled to issue instructions to the Escrow Agent in relation to the RERA Designated Accounts and for the limited purpose of transferring any and all sums of money from the RERA Designated Accounts to the corresponding Debenture Trustee Escrow Account. Any such. instruction issued by any Promoter shall be in the format as set out in Schedule III hereto and shall*



mandatorily be accompanied by (i) a certificate in the format as prescribed under the RERA Act from the project engineer of the specific RERA Project; (ii) a certificate in the format as prescribed under the RERA Act from the project architect of the specific RERA Project; and (iii) a certificate in the format as prescribed under the RERA Act from the chartered account of the specific RERA Project. It is clarified that any sum of money withdrawn from any RERA Designated Account shall mandatorily be transferred to the corresponding Debenture Trustee Escrow Account only.

- (d) It is clarified that neither the Promoters nor any of their Affiliates will be permitted to issue any instructions or operate in any manner whatsoever the Debenture Trustee Escrow Accounts or the Collection Escrow Accounts. Any transfer of sums from the Collection Escrow Accounts to the corresponding RERA Designated Account and the corresponding Debenture Trustee Escrow Account will strictly be in accordance with this Agreement and Schedule II hereto. Any transfer of sums from the Debenture Trustee Escrow Accounts will strictly be in accordance with the instructions issued solely by the Debenture Trustee (acting at all times in accordance with the Transaction Documents) to the Escrow Agent.*
- (e) Prior to the occurrence of an Event of Default, the names of the authorised signatories of each of KIPL, GPPL, and NBPL for the sole purpose of issuing instructions in relation to withdrawal of sums from the RERA Designated Accounts to the corresponding Debenture Trustee Escrow Account and their specimen signatures for the purpose of standing instructions, notices and other related instructions to the Account Bank or to the Escrow Agent for this limited purpose shall be in accordance with the resolutions passed by the board of directors of each of the Promoters and annexed to this Agreement hereto.*



Notwithstanding anything to the contrary stated in this Agreement, upon the occurrence of an Event of Default under the Debenture Trust Deed, in case of each of the RERA Designated Accounts, the Account Bank shall, immediately upon being informed of the occurrence of any such Event of Default by the Debenture Trustee (acting at all times in accordance with the terms of the Transaction Documents) and after having received a board resolution passed by the respective Promoter in this regard, revoke the authority granted to the existing signatories of each of KIPL, GPPL, and NBPL under Clause 3.2(e) above. On and from the occurrence of an Event of Default, each of the RERA Designated Accounts shall be operated solely by such director or key managerial personnel of the Promoter that is in accordance with the Transaction Documents, and each Promoter undertakes to submit a board resolution to the Account Bank and to the Escrow Agent in this regard. The signatory of each of the Promoters authorised to operate the RERA Designated Accounts upon the occurrence of an event of default and thereafter shall issue instructions substantially in the form set out in Schedule III hereto. On and from the occurrence of an Event of Default, the Escrow Agent and the Account Bank shall act on the sole instruction of only the authorised signatory of the Promoters so specified in the board resolutions passed by the Promoters upon the occurrence of an Event of Default, and the Escrow Agent and the Account Bank, shall in no way be bound by or act as per any other instructions received from any other Person, including any other signatory of KIPL, GPPL or NBPL, their Affiliates or their authorised representatives.

- (f) The name of the authorised signatory of the Debenture Trustee for the purpose Debenture of issuing instructions in relation to withdrawal of sums from each of the Debenture Trustee Escrow Accounts and his specimen signature for the*



purpose of standing instructions, notices and other related instructions to the Account Bank or to the Escrow Agent shall be in accordance with the resolution passed by the Debenture Trustee and annexed to this Agreement hereto.

- (g) The Debenture Trustee and the Promoters undertake to give the Escrow Agent. 5 (five) clear Business Days' notice in writing of any change to their authorised signatories.*
- (h) Amounts shall only be withdrawn from the Escrow Accounts to the extent such withdrawal does not cause any of the Escrow Accounts to have a negative balance and the Account Bank shall not have any obligation to monitor any of the Escrow Accounts for this purpose or incur any liability whatsoever from any non-distribution in such circumstances. Notwithstanding the above, the Account Bank shall be liable in an event of wilful default, gross negligence. and fraud.*
- (i) Upon the receipt of an occupancy certificate in relation to the Sikkd Kaamna Project, the Account Bank shall. and the Escrow Agent shall procure that the Account Bank does, transfer all funds lying, from time to time, to the credit of the KIPL RERA Designated Account and the KIPL Collection Escrow Account to the KIPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bank and the Escrow Agent. shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the KIPL RERA Designated Account and the KIPL Collection Escrow Account to the KIPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from KIPL and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close*



the KIPL RERA Designated Account only. It is hereby clarified that upon the closure of the KIPL RERA Designated Account, all amounts lying, from time to time, to the credit of the KIPL Collection Escrow Account shall be transferred only to the KIPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement.

- (j) *Upon the receipt of an occupancy certificate in relation to the Sikka Karmic Project, the Account Bank shall, and the Escrow Agent shall procure that the Bank does, transfer all funds lying, from time to time, to the credit of the GPPL RERA Designated Account and the GPPL Collection Escrow Account to the GPPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bank and the Escrow Agent shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the GPPL RERA Designated Account and the GPPL Collection Escrow Account to the GPPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from GPPL, and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close the GPPL RERA Designated Account only. It is hereby clarified that upon the closure of the GPPL RERA Designated Account, all amounts lying, from time to time, to the credit of the GPPL Collection Escrow Account shall be transferred only to the GPPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement.*

- (k) *Upon the receipt of an occupancy certificate in relation to the Sikka Kirat Project, the Account Bank shall, and the Escrow*



Agent shall procure that the Account Bank does, transfer all funds lying, from time to time, to the credit of the NBPL RERA Designated Account and the NBPL Collection Escrow Account to the NBPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement. It is hereby clarified that required instruction shall be provided by the Debenture Trustee to the Account Bank for activating such auto-sweep. The Account Bank and the Escrow Agent shall not take instructions from any other Person or entity in this regard. Upon the transfer of all funds from the NBPL RERA Designated Account and the NBPL Collection Escrow Account to the NBPL Debenture Trustee Escrow Account, the Debenture Trustee, upon receiving such request from NBPL, and subject to clause 7.6 below, shall be entitled to (but not obliged to) issue a confirmation to the Account Bank to close the NBPL RERA Designated Account only. It is hereby clarified that upon the closure of the NBPL RERA Designated Account, all amounts lying, from time to time, to the credit of the NBPL Collection Escrow Account shall be transferred only to the NBPL Debenture Trustee Escrow Account on a daily auto-sweep basis at the close of each Business Day during the term of this Agreement.”

18. In terms of the aforementioned clause, the power to operate escrow account was given to some agent nominated by the Applicant, but merely because certain person nominated by the bankruptcy trustee is authorised to operate the account, it cannot be said that there is no default on behalf of the Corporate Debtor as it is not the case of the Corporate Debtor that there was sufficient amount available in the account to redeem the debentures on due dates. Thus, we do not find any force in the plea on behalf of the Corporate Debtor that merely because the Applicant was allowed to nominate a person



to operate the escrow account, the present application is not maintainable for the reasons that the operator of account could not make the payment. Such plea could be accepted only if the sufficient amount in the account could be availed and the nominee could be negligent in performing his duty to make the payment. At this stage, Mr. Gaurav Mitra, Ld. Counsel for the Applicant submitted that the Corporate Debtor has no sufficient money to discharge the debt instantly and to execute the settlement, it would need the period of a couple of month.

19. To keep the legal process straight, we may make a reference to provisions of Section 5(8)(c) of IBC, 2016 which provides that any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument would constitute financial debt. The Clause reads thus:-

“5. Definitions.—

.....

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

.....

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;”

20. The Section 5(8) provides that the financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. We find that in the present case, the trust deed provided for interest payable on the amount of consideration of non-convertible debentures.



21. Here it would not be out of context to mention that there are multiple financial transactions between the Debenture Holders and the Corporate Debtor and anything observed by us hereinabove would not reflect on the exact amount of NCD. What we are concerned about in the present proceedings is the threshold limit of amount of default which is mentioned at Rs. 1 crore in Section 4 of IBC, 2016. In any case, we consider it appropriate to reproduce Part-IV of the application preferred by the Applicant to take note of the exact amount of debt and default alleged by the Applicant. The Part-IV of the petition reads thus:-

Part- IV

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<p>The Applicant is a Debenture Trustee acting for the benefit and on behalf of Asia Pragati Strategic Investment Fund i.e. the Debenture Holder, which had extended a secured debt and facility to Kindle Infraheights Private Limited i.e the Corporate Debtor by subscribing to secured, unlisted, redeemable, freely transferable, non-convertible debentures ("NCDs") of the below-listed values:</p> <ol style="list-style-type: none"> 13000 (Thirteen Thousand) NCDs of a face value of INR 1,00,000/- (Indian Rupees One Lakh only) each, aggregating to INR 130,00,00,000 (Indian Rupees One Hundred and Thirty Crores only) on July 1, 2019 under Debenture Trust Deed dated June 27, 2019 ("DTD-1"), as amended and restated by the Amended and Restated Debenture Trust Deed dated September 30, 2020 ("Amended DTD-1") and related transaction/security documents. Copies of the DTD-1 and the Amended DTD-1 are annexed as Exhibit 1 and 2 respectively. 600 (Six Hundred) NCDs of a face value of INR 1,00,000/- (Indian Rupees One Lakh only)] each, aggregating to INR 6,00,00,000/- (Indian Rupees Six Crores only) on March 9, 2021 under Debenture Trust Deed dated February 25, 2021 ("DTD-2") and related transaction/security documents. A copy of DTD-2 is annexed as Exhibit 3 herewith. <p>Therefore, there has been a total</p>



	<p>disbursement of INR 136,00,00,000/- (Indian Rupees One Hundred and Thirty Six Crores only), of which INR 130,00,00,000/- (Indian Rupees One Hundred and Thirty Crores only) was disbursed on July 1, 2019, and INR 6,00,00,000/- (Indian Rupees Six Crores only) was disbursed on March 9, 2021. These dues, over time and with applicable interest under the Amended DTD-1 and DTD-2 (collectively "DTDs") remain outstanding.</p>
<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</p>	<p>The total amount in default is INR 2,688,693,529/- as on June 03, 2022. However, for the purposes of the present filing and initiation of CIRP under Section 7 of the IBC, the Applicant is excluding the amount in default occurred during the period applicable under Section 10A of the IBC.</p> <p>Accordingly, for the purpose of the present petition, the amount claimed to be in default is as follows:</p> <p>DEFAULT AMOUNT CLAIMED UNDER PRESENT PETITION</p> <p>The total amount claimed to be in default is INR 76,25,21,682/- as due and payable on June 03, 2022 plus further applicable interest and other charges, details of which are as set out below:</p> <p>(i) Amended DTD -1 : INR 70,50,00,000/- being due and payable as on June 03, 2022 under the Amended DTD-1, plus further applicable interest from that date till date of payment; and</p> <p>(ii) DTD - 2: INR 5,75,21,682/-, being as follows:</p> <p>(A) INR 4,97,93,120/- being due and payable as on June 03, 2022</p> <p>(B) INR 77,28,562/- being the interest amount (including default interest) due and payable as on June 03, 2022</p> <p>(C) plus further applicable interest from that date till date of payment.</p> <p>DATES OF DEFAULT:</p> <p>Amended DTD-1: March 31, 2021</p> <p>DTD-2 June 09, 2021</p> <p>Additionally, by way of abundant caution and in order to preserve the rights of the Applicant, the Applicant has also set out below the amounts in default under the Amended DTD-1 and DTD -2 (not taking into account Section 10A of IBC moratorium period for the purposes of initiation of CIRP). The amount claimed to be in default hereinabove is without prejudice to the right of the Applicant to claim full amount in default at the time of filing of the claim before the IRP/RP, should the application be admitted.</p> <p>COMPUTATION OF DEFAULT AS PER AMENDED DTD-1 and DTD 2</p> <p>Amended DTD-1- INR 2,631,171,847</p> <p>(i) INR 1,300,000,000/- being the principal amount due and payable as on June 03, 2022</p>



		(ii) INR 1,331,171,847/- being the interest amount (including default interest) due and payable as on June 03, 2022
		(iii) plus further applicable interest from that date till date of payment; and
		DTD-2- INR 57,521,682/-
		(i) INR 49,793,120/- being due and payable as on June 03, 2022
		(ii) INR 77,28,562/- being the interest amount (including default interest) due and payable as on June 03, 2022
		(iii) plus further applicable interest from that date till date of payment.
		A statement of computation of the current outstanding amount including all the defaulted amounts and days of default in respect of the above facilities is hereto annexed and marked as "Exhibit 4".

22. **In the facts and circumstances of the case, as noted above we are left with no option but to admit the present application.** Ordered accordingly. Resultantly **IA-4140/2023 and IA-5710/2023** stands disposed of in view of the above order.

23. **In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and** as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

- (a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;
- (c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under



the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

- (d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent.

24. As proposed by the Petitioner, Mr. Hemant Sethi, having Registration No. IBBI/IPA-002/IP-N01107/2021-22/13628 and e-mail id: hemantmlsethi60@gmail.com is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that Mr. Hemant Sethi, IRP shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

25. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

26. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

27. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.



28. As we closed hearing Mr. Gaurav Mitra, Ld. Counsel for the Petitioner appeared along with Mr. Vivek Kumar emphatically submitted that the Corporate Debtor is keen and willing to arrive at settlement with the Financial Creditor/Debenture Holders regarding the defaulted amount, we make it clear that in the event of their being any settlement arrived at between the parties, the RP would take the required steps for the purpose and would not cause any delay in this regard.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Upasana/Ruchita