

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(Arguments through web-based video conferencing platform)**

**IA No. 1311/2022
In
CP (IB) No. 237/Chd/Chd/2021
(Admitted)**

In the matter of:

M/s. Area Importers and Exporters Private Limited
...Petitioner-Financial Creditor

Versus

M/s. Gupta Builders and Promoters Private Limited
....Respondent-Corporate Debtor

And in the matter of:

IA No. 1311/2022

State Bank of India

RACPC, State Bank of India, Plot No. 1-2B
City Centre, Sector-5, Panchkula- 134109

....Applicant

Versus

Mr. Mukesh Gupta

Interim Resolution Professional

M/s. Gupta Builders and Promoters Private Limited

office at : F-1, Milap Nagar, Uttam Nagar,
New Delhi-110059

....Respondent

Judgement delivered on: 04 .01.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Applicant : Mr. Sanjay Lalit, Advocate

For the Respondent : Mr. Viren Sharma, Advocate

Per: Subrata Kumar Dash, Member (Judicial)

JUDGMENT

IA No. 1331/2021

The instant IA has been filed by State Bank of India (herein referred to as 'Applicant') against Mr. Mukesh Gupta, Resolution Professional of M/s Area Importers and Exporters Private Limited (herein referred to as 'Respondent') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Rule 11 of NCLT Rules.

2. The applicant has prayed to pass an order directing Interim Resolution Professional (IRP) to admit the claim of the Applicant Bank and to include the name of the applicant as financial creditor. It is further prayed to share the details of the immovable assets and other assets to the Applicant and to pass an order directing Interim Resolution Professional to include the name of the Applicant Bank in the Committee of Creditors (CoC).

3. The brief facts of the case are that the CIRP proceedings were initiated against M/s Gupta Builders and Promoters Private Limited, (herein referred to as 'Corporate Debtor'), by order dated 31.05.2022 passed in CP (IB) No. 237/Chd/Chd/2021. Mr. Mukesh Gupta was appointed as an Interim Resolution Professional (IRP) for the Corporate Debtor and subsequently appointed as Resolution Professional (RP). The Interim Resolution Professional has made public announcement in Form A on 02.06.2022 in newspapers and the last date for submission of claims was fixed as 14.06.2022. The Resolution Professional has also published Form G on 14.08.2022 inviting Expression of Interest under Regulation 36A (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4. In the application, it is stated that the Applicant Bank submitted its claim in Form C to Resolution Professional on 09.09.2022 claiming the total amount of Rs.24,59,41,768/- as on the date of the CIRP. The Applicant has provided home loan to 131 borrowers and Tripartite Agreement was entered between the borrowers, Bank and the corporate debtor. It is submitted that convenience deed(s)/sale deed(s) is not executed in favour of any borrower and the possession has not been delivered yet. Accordingly, the bank has first charge/lien as secured creditors over the said 131 flats for the repayment of the loan of the bank. As per the Tripartite Agreement, the responsibility of the corporate debtor would have come to an end only after handing over the possession of the unit to the borrower.

5. The respondent has filed its reply by Diary No.02337/01 dated 07.11.2022 stating that as per Form A, the last date for submission of claim is 14.06.2022 and the applicant has submitted its claim in Form C on 09.09.2022 i.e. 101 days after the CIRP commencement date. As per Regulation 12(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the claim can be filed within 90 days of CIRP commencement. Moreover, for filing the claim as financial creditor, the amount has to be disbursed to the Corporate Debtor for time value of money. In this case, the allottees have approached the Applicant for financial assistance and the Applicant has disbursed loans to the Individual Allottees and not to the Corporate Debtor.

6. It is submitted that the Tripartite Agreement has been executed between the allottee, Corporate Debtor and the Bank. The relevant portion and clauses of the Tripartite Agreement are reproduced herein for the sake of clarity :

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1. *The SBI has and shall have the first lien over the said flat for the due repayment of the loan which SBI has granted to the Borrower. The Builder shall note in its records the charge and lien of SBI over the said flat. The Builder shall not transfer the said flat to any other person without the prior written consent of SBI.*

2. *The Builder/ Developer agrees that it has no objection to the Borrower(s) mortgaging the said flat with proportionate share in land to the SBI as security for the sai loan agreed to be advanced by the SBI for the purpose of purchase/ construction of the said flat. In the event of default in the repayment of loan and/or the Borrower(s) committing any other default which makes the Borrower(s) liable for repayment of the entire amount outstanding in the said loan as per the terms of Loan Agreement executed between the Borrower(s) and the SBI, the builder shall at the request of SBI, be under obligation to not deliver possession to the Borrower and/or to cancel the booking and pay all amounts received by the Builder on behalf of the Borrower(s) to SBI including also any amount paid by the Borrower to the Builder.*

12. *It is understood that the term “loan” mentioned herein shall include interest, penal interest and all other sums payable by the borrower(s) to the SBI.*

13. *That in the event of any default by the Borrower(s), the SBI may at its discretion enforce the security by the sale and the Builder shall accept the Purchaser or the said flat in place of the Borrower(s) after the Purchaser*

complies with the necessary requirements of the Builder/ Developer in this respect."

7. The respondent has relied upon the judgement of **Axis Bank Limited versus Value InfraCon India Private Ltd. and Anr.**, I.A. No. 1502 of 2020 & I.A. No. 1503 of 2020 in Company Appeal (AT) (Ins.) No. 582 of 2020 dated 20.12.2021 wherein it has been held that :

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

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

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

17. Be that as it may, we are of the considered view that this subject matter cannot be viewed from such a narrow compass. It is definitely not the scope and objective of the Code to include Banks/Financial Institutions which have advanced loans to Home Buyers to be considered as 'Financial Creditors' and included in the CoC, specifically in the light of the fact the liability to repay the Home Loan is on the individual Home Buyers. This would defeat the very spirit and objective of the Code aiming at Resolution and maximisation of the assets of the 'Corporate Debtor'. Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by

the Home Buyer vis-a-vis the Bank and vis-a-vis the 'Corporate Debtor'. Viewed from any angle, the Appellant cannot be included as a 'Secured Financial Creditor' in this case and hence we find no reasons to interfere with the well-reasoned Order of the Adjudicating Authority.

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

8. The respondent has also relied upon the judgement of Hon'ble NCLAT in case of **Axis Bank Limited v. Shubhkamna Buildtech Private Limited & Anr. - Company Appeal (AT)(Insolvency) No. 665 of 2021 dated 30.08.2022** wherein similar issue with similar facts were adjudicated and Judgement of **Axis Bank Limited versus Value InfraCon India Private Ltd. and Anr. (Supra)** has been upheld.

9. The applicant has filed a rejoinder by diary No.02337/2 dated 14.11.2022 stating that although Home Loan Borrowers may be Physical Financial Creditors in the records of Corporate Debtors but to the extent of Home Loan financed by the Applicant to the 131 Home Loan Borrowers, the Applicant Bank should be treated as Beneficial Financial Creditors of Corporate Debtors. The Applicant has provided Home Loan to 131 borrowers (Exhibit 'A' of the rejoinder), and the applicant has submitted the total amount of Claim of INR. 24,59,41,768/- (Twenty Four Crore Fifty Nine Lath Forty One Thousand Seven Hundred Sixty Eight only) as on date of commencement of Resolution Process (CIRP) of this Corporate Debtor in Claim Form -C along with the list of 131 borrowers. Only 86 Home Buyers have submitted their claims of Rs.16,79,41,093/- to Resolution Professional (the list is attached as Exhibit B) and 45 Home Buyers have not submitted their claims of Rs.7,80,00,675 to RP which need to be properly addressed by the Applicants by getting representation in the CoC of Corporate

Debtor. As per Clause 2 of the Tripartite Agreement, the builder-developer has no objection to the borrower mortgaging the flat with the State Bank of India and as per Clause 13 of the Agreement, the bank has the discretion to enforce the security by the sale.

10. We have heard Learned Counsel for Applicant and Learned Counsel for Respondent and have pursued the record carefully.

11. In the present case, it is admitted fact that the loan has been disbursed by the State Bank of India to the Real Estate Allottees of the project of the corporate debtor and the same has not been directly sanctioned in the name of the corporate debtor. There is nothing on the record to show that if any 'charge' has been created against any of the properties of the 'Corporate Debtor' in favour of the Applicant and as per Section 77 of the Companies Act, 2013, every security interest has to be registered with the Registrar within 30 days of its creation. The applicant has filed the claim in Form C on the basis of the Tripartite Agreement executed between the Corporate Debtor, Real Estate Allottees and Applicant Bank.

12. As is evident from the extracts of the Tripartite agreement mentioned in Para 6 above, the term 'Loan' is used in the context of the borrowers and State Bank of India, and the Corporate Debtor Clearly stands out of this transaction. Even in the event of the State Bank of India enforcing the security by sale of the Flat in case of a default, the builder will accept the new purchaser of the flat as per the Tripartite agreement. Thus, the applicant bank cannot be said to have extended the loan to the corporate bank. The fact that many real estate allottees have not filed their claim would not in any way support the contention of the applicant to be considered a Secured Financial Creditor of the Corporate Debtor.

The judgement of **Axis Bank Limited versus Value InfraCon India Private Ltd. and Anr. (Supra)** clearly state that *‘the Presence of a mere tri-partite Agreement does not change the character of the amount borrowed by the Home Buyer vis-a-vis the Bank and vis-a-vis the ‘Corporate Debtor’* and the applicant cannot be included as a ‘Secured Financial Creditor’.

13. In view of the aforesaid discussions, IA No. 1311/2022 is dismissed and disposed of accordingly.

-sd-
(Subrata Kumar Dash)
Member (Technical)

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(Harnam Singh Thakur)
Member (Judicial)

January 04, 2023
SM/SA